United Nations

Report of the International Law Commission

on the work
of its forty-fifth session

3 May–23 July 1993

General Assembly
Official Records • Forty-eighth Session
Supplement No. 10 (A/48/10)

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CHAPTER I

INTRODUCTION

1. The International Law Commission established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its forty-fifth session at its permanent seat at the United Nations Office at Geneva, from 3 May to 23 July 1993.

A. Membership

2. The Commission consists of the following members:

Mr. Husain Al-Baharna (Bahrain)
Mr. Awn Al-Khasawneh (Jordan)
Mr. Gaetano Arangio-Ruiz (Italy)
Mr. Julio Barboza (Argentina)
Mr. Mohamed Bennouna (Morocco)
Mr. Derek William Bowett (United Kingdom)
Mr. Carlos Calero Rodrigues (Brazil)
Mr. James Crawford (Australia)
Mr. John de Saram (Sri Lanka)
Mr. Gudmundur Eiriksson (Iceland)
Mr. Salifou Fomba (Mali)
Mr. Mehmet Güney (Turkey)
Mr. Kamil Idris (Sudan)
Mr. Andreas Jacovides (Cyprus)
Mr. Peter Kabatsi (Uganda)
Mr. Abdul Koroma (Sierra Leone)
Mr. Mochtar Kusuma-Atmadja (Indonesia)
Mr. Ahmed Mahiou (Algeria)
Mr. Vaclav Mikulka (Czech Republic)
Mr. Guillaume Pambou-Tchivounda (Gabon)
Mr. Alain Pellet (France)
Mr. Pemmaraju Sreenivasa Rao (India)
Mr. Edilbert Razafindralambo (Madagascar)
Mr. Patrick Lipton Robinson (Jamaica)
Mr. Robert Rosenstock (United States)
Mr. Jiuyong Shi (China)
Mr. Alberto Szekely (Mexico)
Mr. Doudou Thiam (Senegal)

Mr. Christian Tomuschat (Germany)

Mr. Edmundo Vargas Carreño (Chile)

Mr. Vladlen Vereshchetin (Russian Federation)

Mr. Francisco Villagran Kramer (Guatemala)

Mr. Chusei Yamada (Japan)

Mr. Alexander Yankov (Bulgaria)

B. Officers

3. At its 2295th meeting on 3 May 1993, the Commission elected the following officers:

Chairman:	Mr. Julio Barboza
First Vice-Chairman:	Mr. Gudmundur Eiriksson
Second Vice-Chairman:	Mr. Kamil Idris
Chairman of the Drafting Committee:	Mr. Vaclav Mikulka
Rapporteur:	Mr. John de Saram

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as Chairman of the Commission, 1/ and the Special Rapporteurs. 2/ The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2298th meeting on 17 May 1993, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission and its documentation and to report thereon to the Enlarged Bureau. The Planning Group was composed of the following members: Mr. Gudmundur Eiriksson (Chairman), Mr. Awn Al-Khasawneh, Mr. Carlos Calero Rodrigues, Mr. Salifou Fomba, Mr. Mehmet Güney, Mr. Mochtar Kusuma-Atmadja, Mr. Ahmed Mahiou, Mr. Guillaume Pambou-Tchivounda, Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Patrick Lipton Robinson, Mr. Robert Rosenstock, Mr. Edmundo Vargas Carreño, Mr. Vladlen Vereshchetin, Mr. Chusei Yamada and Mr. Alexander Yankov. Mr. Derek William Bowett and Mr. Alain Pellet were ex officio members, as coordinators for their respective Working Groups (see paras. 426 and 444 below).

1/ Namely, Mr. Abdul Koroma, Mr. Jiuyong Shi, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov.

2/ Namely, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Robert Rosenstock and Mr. Doudou Thiam.

The group was open-ended and other members of the Commission were welcome to attend its meetings.

C. Drafting Committee

5. At its 2295th meeting, on 3 May 1993, the Commission appointed for the topic "State responsibility" a Drafting Committee which included, in addition to the Chairman of the Committee, Mr. Husain Al-Baharna, Mr. Julio Barboza, Mr. Derek William Bowett, Mr. Carlos Calero Rodrigues, Mr. James Crawford, Mr. Gudmundur Eiriksson, Mr. Peter Kabatsi, Mr. Alain Pellet, Mr. Robert Rosenstock, Mr. Jiuyong Shi, Mr. Alberto Szekely, Mr. Vladlen Vereshchetin and Mr. Francisco Villagran Kramer. Mr. Gaetano Arangio-Ruiz participated in his capacity as Special Rapporteur for the topic.

6. At its 2308th meeting, on 16 June 1993, the Commission appointed for the topic "International liability for injurious consequences arising out of acts not prohibited by international law" a Drafting Committee which included, in addition to the Chairman of the Committee, Mr. Husain Al-Baharna, Mr. Carlos Calero Rodrigues, Mr. Gudmundur Eiriksson, Mr. Mehmet Güney, Mr. Peter Kabatsi, Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Robert Rosenstock, Mr. Jiuyong Shi, Mr. Alberto Szekely, Mr. Christian Tomuschat, Mr. Vladlen Vereshchetin and Mr. Francisco Villagran Kramer. Mr. Julio Barboza participated in his capacity as Special Rapporteur for the topic.

7. The Drafting Committee retained the same composition for the topic "The law of the non-navigational uses of international watercourses". Mr. Robert Rosenstock participated in his capacity as Special Rapporteur for the topic.

8. Mr. John de Saram participated in the work of the Drafting Committee in his capacity as Rapporteur of the Commission.

D. Working Group on a draft statute for an international criminal court

9. At its 2298th meeting on 17 May 1993, the Commission established a Working Group on a draft statute for an international criminal court pursuant to the invitation contained in paragraph 6 of General Assembly resolution 47/33, which was composed of the following members: Mr. Abdul Koroma (Chairman), Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Gaetano Arangio-Ruiz, Mr. Bowett, Mr. Carlos Calero Rodrigues, Mr. James Crawford, Mr. John de Saram, Mr. Mehmet Güney, Mr. Kamil Idris,

Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Patrick Lipton Robinson, Mr. Robert Rosenstock, Mr. Christian Tomuschat, Mr. Vladlen Vereshchetin, Mr. Francisco Villagran Kramer and Mr. Alexander Yankov. Mr. Doudou Thiam participated in his capacity as Special Rapporteur for the topic "Draft Code of Crimes against the Peace and Security of Mankind". The Working Group was open to any member who wished to participate.

E. Secretariat

10. Ms. Jacqueline Dauchy, Acting Director of the Codification Division of the Office of Legal Affairs acted as Secretary to the Commission. Mr. Manuel Rama-Montaldo, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Ms. Mahnoush H. Arsanjani, Legal Officer and Ms. Virginia Morris, Associate Legal Officer, served as Assistant Secretaries to the Commission.

F. Agenda

11. At its 2295th meeting, on 3 May 1993, the Commission adopted an agenda for its forty-fifth session consisting of the following items:

1. Organization of the work of the session.
2. State responsibility.
3. Draft Code of Crimes against the Peace and Security of Mankind.
4. The law of the non-navigational uses of international watercourses.
5. International liability for injurious consequences arising out of acts not prohibited by international law.
6. Programme, procedures and working methods of the Commission and its documentation.
7. Cooperation with other bodies.
8. Date and place of the forty-sixth session.
9. Other business.

12. The Commission considered all the items on its agenda. It held 33 public meetings (2295th to 2327th) and, in addition, the Drafting Committee of the Commission held 37 meetings, the Working Group on a draft statute for an international criminal jurisdiction held 22 meetings, the Enlarged Bureau of the Commission held 3 meetings and the Planning Group of the Enlarged Bureau held 2 meetings.

G. General description of the work of the Commission at its forty-fifth session

13. In the framework of the topic "Draft Code of Crimes against the Peace and Security of Mankind", [3] the Commission considered the eleventh report of the Special Rapporteur, Mr. Doudou Thiam (A/CN.4/449 and Corr.1 (English only)), dealing with the question of an international criminal jurisdiction, and the report of the Working Group established by the Commission on a draft statute for an international criminal jurisdiction. [4]

14. The Special Rapporteur's eleventh report contained a draft statute of an international criminal court consisting of 37 articles divided into three titles. Title I on the creation of the court, title II on organization and functioning and title III on procedure. The report of the Working Group referred to above contains a draft statute for an international criminal tribunal consisting of 67 articles and divided into seven main parts: Part 1 dealing with the establishment and composition of the court (articles 1-21); Part 2 on Jurisdiction and applicable law (articles 22-28); Part 3 on Investigation and commencement of prosecution (articles 29-35); Part 4 on the Trial (articles 36-54); Part 5 on Appeal and review (articles 55-57); Part 6 on International cooperation and judicial assistance (articles 58-64) and Part 7 on Enforcement of sentences (articles 65-67). The Commission considered the report of the Working Group and felt that the draft articles contained therein provided a basis for their examination by the General Assembly at its forty-eighth session. The draft articles are reproduced in an annex to this report. [5]

15. As regards the topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission considered the ninth report of the Special Rapporteur, Mr. Julio Barboza (A/CN.4/450). [6] The report dealt with the obligations of prevention of

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[3] This topic was examined by the Commission at its 2298th to 2301st, 2325th and 2326th plenary meetings held between 18 and 28 May and on 21 and 22 July 1993.

[4] See para. 9 above.

[5] For an account of the treatment of this topic at the current session, see Chapter II.

[6] This topic was considered at the 2300th, 2302nd to 2306th and 2318th meetings, held between 25 May and 11 June and on 13 July 1993.

transboundary harm and contained 11 draft articles, namely article 11 (Prior authorization), article 12 (Transboundary impact assessment), article 13 (Pre-existing activities), article 14 (Performance of activities), article 15 (Notification and information), article 16 (Exchange of information), article 17 (National security and industrial secrets), article 18 (Prior consultation), article 19 (Rights of the State presumed to be affected), article 20 (Factors involved in a balance of interests) and article 20 bis (Non-transference of risk or harm). At the conclusion of its consideration of the report, the Commission referred articles 11 to 20 bis, together with article 10 (Non-discrimination) which the Commission had examined at its forty-second (1990) session to the Drafting Committee. The Commission received from the Drafting Committee article 1 (Scope of the present articles), article 2 (Use of terms), article 11 (Prior authorization), article 12 (Risk assessment) and article 14 (Measures to minimize the risk), adopted on first reading by the Drafting Committee at the current session (A/CN.4/L.487 and Corr.1 (French and Spanish only)). It took note of the recommendations of the Drafting Committee and decided to defer action on them until its next session pending the submission of commentaries. 7/

16. As regards the topic "State responsibility", 8/ the Commission had before it the fifth report of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz (A/CN.4/453, 453/Add.1 and Corr.1, 2 and 3 and Add.2 and 3). Chapter I of the fifth report was entitled "Part Three of the draft articles on State responsibility: dispute settlement procedures". It contained six draft articles (namely article 1 (Conciliation), article 2 (Task of the Conciliation Commission), article 3 (Arbitration), article 4 (Terms of reference of the Arbitral Tribunal), article 5 (Judicial settlement), article 6 (Excès de pouvoir or violation of fundamental principles of arbitral procedures)) and an Annex thereto. At the conclusion of its consideration of this chapter of the report, the Commission agreed to refer articles 1 to 6 and the Annex thereto to the Drafting Committee for consideration in the light of the discussion. Chapter II of the fifth report was entitled: "The consequences of the

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7/ For an account of the treatment of the topic at the current session, see chapter III.

8/ The topic was examined at the 2305th to 2310th, 2314th to 2316th, 2318th to 2321st, 2323rd and 2324th meetings held between 10 and 24 June and between 30 June and 21 July 1993.

so-called international 'crimes' of States (article 19 of Part One of the draft articles)". It was introduced by the Special Rapporteur but was not considered for lack of time.

17. The Commission furthermore considered articles adopted at the previous session by the Drafting Committee, on which it had deferred action pending the submission of commentaries. It adopted a new paragraph 2 to be included in article 1 of Part Two of the draft, as well as article 6 (Cessation of wrongful conduct), article 6 bis (Reparation), article 7 (Restitution in kind), article 8 (Compensation), article 10 (Satisfaction) and article 10 bis (Assurances and guarantees of non-repetition).

18. The Commission also received from the Drafting Committee article 11 (Countermeasures by an injured State), article 12 (Conditions relating to resort to countermeasures), article 13 (Proportionality) and article 14 (Prohibited countermeasures), adopted on first reading by the Drafting Committee at the current session (A/CN.4/L.480 and Corr.1 (French only) and L.480/Add.1). It took note of the recommendations of the Drafting Committee and decided to defer action on them until its next session pending the submission of commentaries. 9/

19. As regards the topic "The law of the non-navigational uses of international watercourses", the Commission considered the preliminary report of the Special Rapporteur, Mr. Robert Rosenstock (A/CN.4/451) 10/ which covered the first 10 of the draft articles adopted on first reading at the forty-third (1991) session of the Commission. 11/ The Commission agreed to refer the 10 articles to the Drafting Committee for consideration in the light of the discussion. The Commission received from the Drafting Committee the texts of article 1 (Scope of the present articles), article 2 (Use of terms), article 3 (Watercourse agreements), article 4 (Parties to watercourse agreements), article 5 (Equitable and reasonable utilization and participation), article 6 (Factors relevant to equitable and reasonable utilization), article 8 (General obligation to cooperate), article 9 (Regular

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9/ For an account of the treatment of the topic at the current session, see Chapter IV.

10/ The topic was considered at the 2309th to 2314th, 2316th and 2322nd meetings, held between 18 June and 6 July and on 19 July 1993.

11/ Official Records of the General Assembly, Forty-sixth session, Supplement No. 10 (A/46/10), Chapter III D.

exchange of data and information) and article 10 (Relationship between different kinds of uses) (A/CN.4/L.489). It took note of the recommendations of the Drafting Committee and agreed to defer action on them until its next session pending the submission of commentaries. 12/

20. Matters relating to the programme, procedures and working methods of the Commission were discussed in the framework of the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant decisions of the Commission are to be found in chapter VI of the report, which also deals with cooperation with other bodies and with certain administrative and other matters.

12/ For an account of the treatment of this topic at the current session, see Chapter V.

CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

21. The General Assembly, in resolution 177 (II) of 21 November 1947, directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal; and (b) prepare a draft Code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission, at its first session in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

22. On the basis of the reports of the Special Rapporteur, the Commission: (a) at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session, in 1954, submitted a draft Code of offences against the peace and security of mankind, with commentaries, to the General Assembly. 13/

23. The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code of offences against the peace and security of mankind as formulated by the Commission raised problems closely related to those of the definition of aggression, and that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft Code until the Special Committee had submitted its report.

24. On the basis of the recommendation of the Special Committee, the General Assembly, in resolution 3314 (XXIX) of 14 December 1974, adopted the Definition of Aggression by consensus.

25. On 10 December 1981, the General Assembly, in resolution 36/106, invited the Commission to resume its work with a view to elaborating the draft Code of offences against the peace and security of mankind and to examine it with the

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13/ Yearbook ... 1950, vol. II, pp. 374-378, document A/1316. Yearbook ... 1954, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also Yearbook ... 1985, vol. II (Part Two), pp. 12 and 8, document A/40/10, paras. 45 and 18.

required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. 14/

26. The Commission, at its thirty-fourth session, in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. 15/ The Commission, from its thirty-fifth session, in 1983, to its forty-third session, in 1991, received nine reports from the Special Rapporteur. 16/

27. At its forty-third session, in 1991, the Commission provisionally adopted on first reading the draft articles of the draft Code of crimes against the peace and security of mankind. 17/ At the same session, the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations be submitted to the Secretary-General by 1 January 1993. 18/ The Commission noted: that the draft it had completed on first reading constituted the first part of the Commission's work on the topic of the draft Code of Crimes against the Peace and Security of Mankind; and that the Commission would continue at forthcoming sessions to fulfil the mandate the General Assembly had assigned to it in paragraph 3 of resolution 45/41,

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14/ In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English to read "Draft Code of Crimes against the Peace and Security of Mankind".

15/ For a detailed discussion of the historical background of this topic, see the Report of the International Law Commission on the work of its thirty-fifth session (Official Records of the General Assembly, Thirty-eighth session, Supplement No. 10, (A/38/10)), paras. 26 to 41.

16/ Yearbook ... 1983, vol. II (Part One), p. 137, document A/CN.4/364; Yearbook ... 1984, vol. II (Part One), p. 89, document A/CN.4/377; Yearbook ... 1985, vol. II (Part One), document A/CN.4/387; Yearbook ... 1986, vol. II, document A/CN.4/398; Yearbook ... 1987, vol. II (Part One), document A/CN.4/404; Yearbook ... 1988, vol. II (Part One), document A/CN.4/411; Yearbook ... 1989, vol. II (Part One), document A/CN.4/419 and Add.1 and Corr.1 and 2 (Spanish only); Yearbook ... 1990, vol. II (Part One), document A/CN.4/430 and Add.1; Yearbook ... 1991, vol. II (Part One), document A/CN.4/435 and Add.1 and Corr.1.

17/ See Official Records of the General Assembly, Forty-sixth session, Supplement No. 10 (A/46/10), para. 173.

18/ Ibid., para. 174.

of 28 November 1990, which invited the Commission, in its work on the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. 19/

28. At its forty-sixth session, the General Assembly in its resolution 46/54 of 9 December 1991 invited the Commission, within the framework of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in the Commission's report on its forty-third session (1991) 20/ concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism, in order to enable the General Assembly to provide guidance on the matter.

29. At its forty-fourth session, in 1992, the Commission had before it the Special Rapporteur's tenth report on the topic (A/CN.4/442), which was entirely devoted to the question of the possible establishment of an international criminal jurisdiction. After considering the Special Rapporteur's report, the Commission decided to set up a Working Group to consider further and analyse the main issues raised in the Commission's report on the work of its forty-second session in 1990 concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international court or other international criminal trial mechanism. In so doing, the Working Group would take into account the issues raised by the Special Rapporteur in his ninth report (Part II) (A/CN.4/435 and Add.1 and Corr.1) and in his tenth report, in the light of the discussions thereon at the Commission's past and current sessions. The Working Group would also draft concrete recommendations with regard to the various issues it would consider and analyse within the framework of its mandate. 21/

19/ Ibid., para. 175. The Commission noted that it had already started to discharge this mandate and its work on this aspect of the topic was reflected in paras. 106 to 165 of its report (ibid.).

20/ Ibid., Forty-fifth session, Supplement No. 10 (A/45/10), chap. II, sect. C.

21/ Ibid., Forty-seventh session, Supplement No. 10 (A/47/10), para. 98.

30. At the same session, the Working Group drew up a report to the Commission containing a summary with specific recommendations, an in extenso report examining and analysing a number of issues related to the possible establishment of an international criminal jurisdiction, as well as an appendix. 22/ The structure suggested in the Working Group's report consisted, in essence, of an international criminal court established by a statute in the form of a treaty agreed to by States parties and, in the first phase of its operations, at least, it should exercise jurisdiction only over private persons. Its jurisdiction should be limited to crimes of an international character defined in specified international treaties in force, including the crimes defined in the draft Code of Crimes against the Peace and Security of Mankind upon its adoption and entry into force, but not limited thereto. A State should be able to become a party to the statute without thereby becoming a party to the Code. The court would be a facility for States parties (and also, on defined terms, other States) which could be called into operation when and as soon as required and which, in the first phase of its operation, at least, should not have compulsory jurisdiction and would not be a standing full-time body. Furthermore, whatever the precise structure of the court or other mechanisms (which were also suggested and considered), it must guarantee due process, independence and impartiality in its procedures. 23/

31. Also at the same session, the Commission noted that, with the examination of the Special Rapporteur's ninth and tenth reports, as well as the report by the Working Group, it had concluded the task of analysis of "the question of establishing an international criminal court or other international criminal trial mechanism", entrusted to it by the General Assembly in 1989; 24/ that a structure along the lines suggested in the Working Group's report could be a workable system; that further work on the issue required a renewed mandate from the Assembly to draft a statute; and that it was now for the Assembly to

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22/ Ibid., para. 99 and Annex.

23/ Ibid., para. 11 and para. 396 of the Annex.

24/ Ibid., Forty-fifth session, Supplement No. 10 (A/45/10) paras. 93-158 and more particularly para. 100.

decide whether the Commission should undertake the project for an international criminal jurisdiction, and on what basis. 25/

32. The General Assembly, in paragraphs 4, 5 and 6 of resolution 47/33 of 25 November 1992, took note with appreciation of chapter II of the report of the International Law Commission, entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction; invited States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; and requested the Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

B. Consideration of the topic at the present session

33. At the present session, the Commission had before it the Special Rapporteur's eleventh report on the topic (A/CN.4/449 and Corr.1 (English only)). The Commission also had before it in document A/CN.4/448 and Add.1 the comments and observations submitted by Governments, pursuant to the request formulated by the Commission at its forty-third session on the draft Code of Crimes against the Peace and Security of Mankind, adopted on first reading at that session; 26/ and, in document A/CN.4/452 and Add.1 and 2, the comments submitted by governments on the report of the Working Group on the question of an international criminal jurisdiction, 27/ further to the invitation contained in paragraph 5 of General Assembly resolution 47/33.

25/ Ibid., Forty-seventh session, Supplement No. 10 (A/47/10), paras. 11 and 104.

26/ See para. 27 above.

27/ See paras. 29-30 above.

1. Eleventh report of the Special Rapporteur

34. The Commission considered the Special Rapporteur's eleventh report at its 2298th to 2301st meetings, held from 17 May to 28 May 1993.

(a) Presentation of the eleventh report by the Special Rapporteur

35. The Special Rapporteur devoted the whole of his eleventh report to the question of a draft statute of an international criminal court. He noted, both in the introduction to his eleventh report and in his presentation of the report to the Commission, that in his three previous reports [28] he had already studied the question of the possible establishment of an international criminal jurisdiction, the aim at that stage being not to submit a draft statute of an international criminal court but rather to initiate a thorough discussion in the Commission on very important aspects relevant to the establishment of such a court, so that the debate could provide the Special Rapporteur with the guidelines necessary for elaborating a draft statute.

36. The Special Rapporteur, introducing his eleventh report to the Commission, stated that he had prepared his report in light of the decisions made last year by the Commission (on the basis of the recommendations of its Working Group on the question of an international criminal jurisdiction) and those of the General Assembly in resolution 47/33. The formulation of a statute for an international criminal court would require, on matters ranging from preferred approaches to details of formulation, an accommodation of differences of view on several issues. He had sought to place before the Commission, in the form of a preliminary draft statute with explanatory observations, a plan of work for its present session, in the light of which, now that the necessary decisions had been made by the General Assembly, work on the formulation of the provisions of a statute for an international criminal court could finally begin. He hoped that his report would raise for consideration, and determination in a pragmatic manner, the difficult questions, many of which were of considerable legal and political sensitivity, which the Commission would need to satisfactorily resolve if the statute was to succeed in its purpose: to engage the widest possible support of all States on the subject of the establishment of an international criminal court. It was in that sense that he would wish, whatever his own preferences might be on particular matters, that his report be considered.

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[28] Documents A/CN.4/430/Add.1, A/CN.4/435 and Add.1 and Corr.1 and A/CN.4/442.

37. The draft statute submitted by the Special Rapporteur consisted of 37 draft articles, divided into three titles. Title I, on the creation of the court, deals with the following: (1) Establishment of the court; (2) The court, judicial organ of the United Nations; (3) Seat of the court; (4) Applicable law; (5) Jurisdiction of the court; (6) Jurisdictional disputes; and (7) Judicial guarantees. Title II, on organization and functioning, deals with the following matters: (8) Permanence of the jurisdiction of the court; (9) Residence of the President and the Registrar; (10) Rules of procedure; (11) Qualifications required; (12) Appointment of judges; (13) Election of the President and Vice-President(s); (14) Appointment of the Registrar; (15) Composition of a chamber of the court; (16) Compatibility with other functions; (17) Deprivation of office; (18) Diplomatic immunity; (19) Vacancy of a seat; (20) Solemn declaration; (21) Allowances, emoluments and salaries; and (22) Budget of the court. Title III, on procedure, deals with the following: (23) Admission of a case to the court; (24) Intervention; (25) Prosecution; (26) Investigation; (27) Judgement by default; (28) Handing over an accused person to the court; (29) Discontinuance of proceedings; (30) Detention under remand; (31) Hearings; (32) Minutes of hearings; (33) Judgement; (34) Penalties; (35) Remedies; (36) Execution of penalties; and (37) Right of pardon and conditional release.

38. The Special Rapporteur said that his report was not intended to offer definitive solutions to a problem of great complexity. Instead, it consisted of a work plan presenting the various subjects of the statute of a court. It tried mostly to respect the spirit and the approach of the Commission, which had hoped for an organ with structures that were adaptable, not permanent and of modest cost.

39. He had based his draft on the choice whereby the court would be an organ of the United Nations. For the Special Rapporteur, it was difficult to imagine the United Nations requesting the Commission, by a resolution, to elaborate the statute of a court that would not be an organ of the United Nations.

40. As far as the applicable law was concerned, the Special Rapporteur said that he had followed the recommendations of the Commission's Working Group, whose view it was that such law could derive only from international conventions and agreements. The proposed court, therefore, would try only such crimes as were defined in those instruments. The matter had given rise

to a lengthy debate in the Commission, but the prevailing - and, in the Special Rapporteur's opinion, the realistic - view was that the applicable law should be limited to international conventions and agreements. Some members, however, had felt that both custom and general principles of law could in certain cases also constitute a source of applicable law. Accordingly, in his draft statute, the Special Rapporteur had placed those notions between square brackets to enable the Working Group to review the matter. In the opinion of the Special Rapporteur, case law could not be disregarded either, for it was difficult to see how a court could be prevented from applying its own case law.

41. As to the court's jurisdiction, the Special Rapporteur said that, in his draft statute, it was not exclusive but concurrent, each State itself being able to try the case, or to refer an accused person to the court. That choice seemed to have won the support of the majority in the Commission. Moreover, in his draft statute such jurisdiction depended on the consent of two States: the State in which the crime had been committed and the State of which the perpetrator of the crime was presumed to be a national. In the Special Rapporteur's opinion, the possibility that the agreement of other States was required might also be considered. 29/

42. Furthermore, in his draft statute, the court's jurisdiction ratione personae would be confined to individuals, in other words, the court could not try either international organizations or States.

43. As far as jurisdiction ratione materiae was concerned, the Special Rapporteur had great expectations in the contribution of members of the Commission. It was a difficult and delicate question which had been debated for a long time and no solution had emerged. No agreement had been reached on a list of crimes to form the subject of such jurisdiction. For that reason, pending a code of crimes, one solution would be for the subject-matter jurisdiction of the court to be established by special agreements between States parties, or by individual acceptance, such instruments being subject to implementation at any time. It was the solution he advocated in his draft statute.

29/ See, for example, the solution adopted in article 27 of the draft statute produced by the 1953 Committee on International Criminal Jurisdiction (A/2645).

44. With reference to organization and functioning, the Special Rapporteur said that the concern, mentioned earlier, for structures that were adaptable, not permanent and of modest cost, had had certain implications with regard to the solutions recommended in his draft statute.

45. For example, in regard to the structure of the court itself, two factors had to be reconciled: the court, as an institution, must be permanent, but it should not operate on a full-time basis. As to the actual composition of the court, the judges would not be elected, as was generally the case in international organizations, but would be appointed by their States of origin. The Secretary-General of the United Nations would then prepare an alphabetical list of the judges so appointed. They would not work full-time.

46. As to the composition of a chamber of the court that was to try a particular case, it was not feasible for all the judges appointed by the States parties to sit in such a chamber at the same time. Accordingly, the Special Rapporteur had proposed that a chamber should be composed of nine judges, although the number could be higher or lower. The judges would be selected by the president of the court from the list prepared by the Secretary-General of the United Nations whenever a case was referred to the court. In making his selection, the president would have to take account of certain criteria in order to guarantee objectivity in the composition of the chamber. For example, a judge who was a national of the State of the alleged perpetrator of the crime could not be selected, nor could a judge from a State on whose territory the crime said to have been committed. The president of the court himself would be elected either by all the judges sitting in plenary or by a committee of States or by the United Nations General Assembly.

47. The Special Rapporteur also pointed out that the fact that the organs of the court did not work on a full-time basis had certain implications, especially as regards the allowances paid to the judges and the compatibility or non-compatibility of a judge's functions vis-à-vis other functions.

48. The same concern for flexibility and economy had led the Special Rapporteur to cut down his draft statute, which did not include all the organs usually to be found in criminal jurisdictions. Hence there was no investigation organ functioning separately from the judgement organ, for every investigation chamber was permanent in character. That was why the draft introduced a system in which the investigation was conducted by the court itself, in other words, by the judgement organ, more often than not in the course of the hearing itself. Similarly, as far as prosecution was concerned,

the Special Rapporteur's draft did not propose the establishment of a department headed by a public prosecutor, assisted by a whole army of officials that the functioning of such an organ implied. That approach had been replaced by the more flexible solution of leaving the prosecution in the hands of the complainant State. However, another variant was also proposed, with the prosecuting authority headed by a prosecutor-general.

49. The Special Rapporteur said that the procedure would consist of a number of stages, including the referral of a case to the court, the investigation and the trial stage. He added that there were two systems of investigation: the inquisitorial system, in which the investigation was assigned to one person, the examining magistrate, who had excessive powers and whose investigation was surrounded with secrecy, and the adversarial system, in which the investigation was carried out openly and publicly by the court itself. In his draft statute the Special Rapporteur had recommended the adversarial system. That did not mean that, where circumstances required or in complex cases, the court could not establish a commission of investigation. As a general rule, however, the investigation procedure should be conducted by the trial court.

50. In the matter of ensuring that the accused person appeared in court, if he failed to do so voluntarily the draft statute provided for a simplified rule between States parties that the defendant should be handed over simply at the request of the court, with, however, reservations involving respect for certain principles. On the other hand, between States not parties to the statute or between States parties and non-party States, only extradition proceedings could guarantee appearance of the defendant if he failed to appear voluntarily. As the court could not conclude extraditions agreements, unless it was recognized to have such authority, it would be for the State party intending to submit the case to the court to obtain extradition of the defendant in its territory and hand him over to the court.

51. With regard to applicable penalties, the Special Rapporteur said that, generally speaking, the criminal code and criminal jurisdiction were the subject of separate instruments under national law. He added that the authors of previous draft statutes had not considered it useful or timely to elaborate separate instruments for both questions. It was the draft statutes of the court that stipulated the penalties and, in general, the court was left to apply the penalties it deemed appropriate, without reference to any code. In his own draft statute, however, the Special Rapporteur had recommended that,

in the present circumstances, the absence of an international criminal code made it necessary to refer either to the law of the State of the perpetrator of the crime, or to the law of the State which had lodged the complaint, in other words, the victim State, or again, to the law of the State on whose territory the crime had been committed.

(b) Summary of the debate

(i) General observations

52. Members expressed their satisfaction and their admiration at the conscientious and delicate work done by the Special Rapporteur, who, after several years of preliminary exploratory work, had succeeded in formulating a draft statute of an international criminal court which invited the Commission to undertake its task with pragmatism, realism and flexibility.

53. Commenting in general terms and in a preliminary way on the orientation of the work, several members stressed that the draft statute should, in regard to the composition and the jurisdiction of the court, the applicable law, the investigation, the administration of the evidence and the procedure in the court, including the execution of penalties, provide the foundations and legal guarantees for an impartial judicial institution based on the principles of the primacy of law and should be free, as far as possible, from political considerations - a point which was viewed as especially important inasmuch as the cases referred to the court would be mostly of a political nature. The remark was made in this context that the moral integrity, independence and competence of the members of the court were factors of the highest importance.

(ii) Nature of the court

54. As at previous sessions of the Commission, it was noted that the question whether an international criminal court ought to be a permanent organ or an ad hoc institution was a matter that would need consideration.

55. Some members objected to the resort to ad hoc courts. A first argument was that the members of a court established in response to a particular situation might be influenced by that situation and fail to observe the rules of objectivity and impartiality. Furthermore, at the internal level, ad hoc or "special" criminal courts were essentially tools used by despotic regimes and resort to such courts at the international level would set a bad example, to the detriment of human rights and the rule of law.

56. A second argument was that ad hoc courts would not be enough of a deterrent particularly as some time was needed to establish a court, however short-lived. Furthermore deterrence was apparent in any clearly proclaimed

intention of the General Assembly and the Security Council to investigate crimes that were being committed in specific contexts and it was therefore not absolutely essential to set up institutions that would perhaps not be unimpeachable from the legal standpoint.

57. Other members pointed out that there was, in certain circumstances, a need for promptness and effectiveness which had in the past led to the establishment of ad hoc tribunals. The remark was made in this connection that a single monolithic permanent court, designed to take account of widely diverse needs might very well fail to meet any of those needs satisfactorily.

58. Some members felt that the court whose statute the Commission was to formulate under the mandate given to it in paragraph 6 of resolution 47/33 should be a permanent institution. Concern was expressed in this connection that the search for excessively flexible solutions regarding the jurisdiction and composition of the court might ultimately lead to an unacceptable result, namely the creation of ad hoc courts. Other members felt that at this juncture, and particularly as it was uncertain whether a permanent international criminal court was likely to be utilized to the degree that would justify the funding it would require, it would be more realistic to envisage a court that would not be in permanent session rather than a permanent court.

(iii) Mode of creation of the court

59. Some members felt that an international criminal court should be established by way of a multilateral convention under the auspices of the United Nations and not by a decision of the Security Council, taking into account the general principles of criminal law and the functions of the Security Council under the Charter. Other members however stressed that the Security Council was empowered in the framework of its mandate under the Charter to take the steps needed to respond appropriately to a perceived need.

(iv) Relationship to the United Nations

60. The question of the relationship that should obtain between the court and the United Nations was recognized as being of fundamental importance. One view was that the court, for a number of very substantial reasons, should be an organ of the United Nations. Such an approach, it was stated, would clearly demonstrate acceptance of the principle of the criminal responsibility of the individual towards the world community, confer the requisite authority on the court, open the way to universal recognition of its jurisdiction and guarantee that it functioned in the general interest. Some members observed

that if the court was to be an organ of the United Nations, its establishment would require either an amendment of the Charter, which did not seem very likely, or a resolution of the General Assembly (Article 22 of the Charter) or of the Security Council (Article 29). Joint establishment by similar resolutions of both of those bodies was described as an appropriate solution to which there was no impediment under the terms of Articles 10 and 24 of the Charter.

61. Some members disagreed with this approach, which, it was stated, had been rejected by the Commission at the previous session. The view was expressed in this context that it was not possible to establish an international criminal court as a judicial organ of the General Assembly or the Security Council under a resolution adopted by either of those bodies, which, it was stated, were not empowered to do so by the Charter. In the view of the members in question, the court should be an entity established by inter-State treaty, separate in status from the United Nations but having, nevertheless, under appropriate agreements, a close cooperative relationship with the United Nations. The remark was made that such a course would avoid questions as to whether amendment of the Charter was necessary. The view was also expressed that such a course (namely establishment of the court by inter-State treaty with closest possible cooperation between the court and the United Nations under appropriate agreement) was clearly desirable if only because it would avoid the very difficult questions that would otherwise be raised as to whether or not amendment of the Charter would be necessary.

(v) Law to be applied by the court

62. The Special Rapporteur drew attention to what appeared to him to be concurrence in the Commission that the court should apply international conventions and agreements relevant to the crimes within its jurisdiction; but, in his view, that was as far as concurrence appeared to go.

63. Some members felt that the Commission should broaden the sources of applicable law and include therein the general principles of law and custom. Mention was also made in this context of internal law, and it was recalled that in the 1992 report of the Working Group there had been a reference to the law enacted by organs of international organizations, in particular the United Nations. The question was asked whether it would not be preferable, in so far as the substantive law to be applied by the court was concerned, for the Statute to directly define what would be regarded as international crimes for the purpose of the Statute, rather than deal with such a matter through a

provision on applicable law. The law to be applied by the court was viewed as including substantive law on what constituted the relevant international crimes; rules of evidence and procedure to be followed and applied by the court in the conduct of its proceedings; and national laws to which the court would need to have regard in determining the sentences it would impose.

(vi) Jurisdiction

64. On the question of the personal jurisdiction (ratione personae) of the court, it was agreed that the jurisdiction of the court would apply solely to individuals.

65. As regards the subject-matter jurisdiction (ratione materiae) of the court, the Special Rapporteur proposed in his draft statute that, pending the adoption of a code of crimes, offences falling within the jurisdiction of the court should be defined by special treaties between States parties or in a unilateral instrument of a State. According to that proposal, treaties or unilateral instruments would determine and clearly define the offences for which one or more States recognized the jurisdiction of the court.

66. The notion that the court's jurisdiction should be founded on the principle of its acceptance was supported by some members, although emphasis was placed on the need to supplement it by a provision recognizing the jurisdiction of the court on the basis of pre-existing multilateral conventions such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, which conferred jurisdiction on an international court in respect of disputes arising out of their application.

67. Other members expressed reservations in this connection. The remark was made that it was difficult to admit that States could, by special treaties or by a unilateral instrument, specify which offences were to fall within the jurisdiction of the court. The court's jurisdiction should be clearly defined and should not depend on whether such or such a State accepted it or not.

68. As regards the State or States whose consent would be required for the court to be competent to try an accused person, the Special Rapporteur proposed, in his draft statute, that the court be given jurisdiction to try any individual, provided the State of which he was a national and the State on whose territory the crime had presumably been committed agreed to its jurisdiction. Some members emphasized that territorial jurisdiction was the

rule most usually applied and should be favoured, since the consent of the State of which the accused was a national was simply a residual rule that should operate only in certain cases.

69. Other members expressed doubts on the Special Rapporteur's proposal as a whole. In their opinion, making the court's jurisdiction conditional upon acceptance by the State of which the individual was a national and on the territorial State would markedly diminish the court's effectiveness and paralyse the court if one of the two States refused to agree to its jurisdiction. In the opinion of those members, it should be enough for the State lodging a complaint about a crime to be able to express its readiness to hand the perpetrator over to the court, which would be free to engage in proceedings or not.

(vii) Appointment of judges

70. The Special Rapporteur's proposal that each State party to the statute of the court should appoint a judge fulfilling certain conditions and that the Secretary-General of the United Nations prepare an alphabetical list of the judges appointed by States met with reservations. The formula was viewed as possibly justifiable for an organ such as the Permanent Court of Arbitration, but inappropriate for an international criminal court, whose judges would have in their hands the honour, reputation and freedom of individuals and would be exposed to pressure and threats of all kinds. Objections were raised to a judicial system that would provide first, for judges to be appointed to an international criminal court by their own Governments, outside any impartial international election process, and second, for them to be assigned to their national residence without any guarantee of security when the court was not sitting.

71. Some members favoured a formula whereby judges would be elected by the General Assembly of the United Nations. Such a formula, it was stated, would contribute to the independence and impartiality of judges, while strengthening the links between the United Nations and the court.

(viii) Structure of the court

72. A number of questions were raised and points made, in light of the proposals contained in the Special Rapporteur's report, as to whether the court should be composed of chambers, and what their responsibilities, number and composition should be; whether there should be a bureau of the court, consisting of the President and Vice-Presidents of the court for overall

supervisory responsibilities; whether the prosecuting authority should be a part of the overall structure of the court; and whether there should be established a registry for administrative responsibilities.

73. As to the seat of the court, it was noted that the Special Rapporteur viewed the issue as an essentially political one to be discussed by the Sixth Committee, which would make proposals to the General Assembly. While there was no disagreement with this view, the remark was made that the statute should allow for the court to sit elsewhere than at the place of its seat and the question was asked whether, in cases where the court would have to try a national of the State in which it had its seat, such proximity would not be detrimental to the serenity of the proceedings.

(ix) Submission of cases to the court

74. With reference to the Special Rapporteur's proposal that a case should be submitted to the court on the complaint of a State, i.e. any State, whether or not a party to the statute, the remark was made that the solution to be adopted in this connection would have repercussions on the prosecution procedure: if the prosecution was to be conducted by States, it was logical that States should submit cases to the court, as the Special Rapporteur proposed; if, on the other hand, an organ of the court or a prosecuting authority was to conduct the prosecution, the right to submit a case could be open to complainants other than States - for instance, international organizations, and possibly certain non-governmental organizations of a humanitarian character. It was suggested to enable the United Nations, and more particularly the Security Council and the General Assembly to submit cases to the court.

(x) Prosecuting authority

75. On this point, two alternatives were considered in the Special Rapporteur's report: one, that the complainant State (the State referring a case to the court) should also be responsible for the prosecution of the case before the court; the other, that prosecution of a case before the court should be the responsibility of a prosecuting authority, independent of the complainant State and the court.

76. The second alternative was generally preferred. Mention was made in this context of the requirements of neutrality and impartiality and of the importance of interposing a "filter" between prosecution and judgement. A prosecuting authority representing the international community, acting quite

independently and over and above any political considerations was viewed as essential to the proper functioning of the court and the serenity of the proceedings.

(xi) Investigation

77. In his draft statute, the Special Rapporteur proposed that, if the court deemed the complaint admissible, it should summon the accused to appear before it and, after having heard the accused and considered the evidence, decide whether or not to institute an investigation.

78. The remark was made that instead of asking the whole court to decide whether or not a complaint was admissible, it might be preferable to entrust that responsibility to the Bureau of the court. It also asked which authority would decide whether or not an investigation should be instituted.

(xii) Handing over of an accused person to the court

79. The Special Rapporteur's draft statute provided that each State party to the statute would have to hand over to the court, at its request, any person against whom the court had instituted proceedings for crimes that fell within its jurisdiction; at the same time that State would ensure that the proceedings had not been instituted on political, racial, social, cultural or religious grounds; that the accused did not enjoy immunity from prosecution; and that the handing over would not be contrary to the principle of *non bis in idem*.

80. The remark was made that the Special Rapporteur's proposal did not take account of cases where the accused had fled the territory of the complainant State nor of cases where the accused was in the territory of a State which was not a party to the statute. It was proposed that, in such cases, the court be authorized by its statute to request the Security Council to secure the handing over of the accused.

81. Doubts were furthermore expressed on whether the State requested to hand over the accused could affirm that a decision of the court had been taken on political, racial, social, cultural or religious grounds. Attention was also drawn to the legal impediments that might derive from treaties of extradition.

(xiii) Trial proceedings

82. There was general agreement that the statute should ensure a fair and impartial trial, conducted in accordance with the applicable rules, with due regard to the rights of the accused and the necessary judicial guarantees as provided in international conventions, such as the International Covenant on Civil and Political Rights. The importance of a trial being public and that

an accused be tried in his presence was emphasized by the Special Rapporteur, even though he noted that provision would need to be made for the case where an accused might through deliberate absence successfully evade the jurisdiction of the court.

83. As regards the latter point, the remark was made that, if judgement by default was not permitted, all the accused would have to do to escape proceedings was to take refuge in a State which was not a party to the statute of the court. That State might simply take no action and allow the accused to leave for a friendly country, so as not to have to extradite or try him, a result which was particularly to be feared in the case of political leaders. Judging by default, on the other hand, would mean that threat of arrest would hang over the accused like the sword of Damocles. It was also said that if the court was empowered to judge by default, it could, in view of its moral and legal authority, be able to reach decisions that would have a definite political weight and would also bring to the attention of world public opinion facts of which it had previously only had partial knowledge. The suggestion was made that, in order to avoid any conflict with the provisions of certain international instruments, particularly the International Covenant on Civil and Political Rights, the possibility should be considered of not automatically applying the penalty imposed if the accused subsequently agreed to appear before the court, in which case the sentence might be reviewed in his presence and confirmed or rejected, as appropriate.

(xiv) Penalties

84. In his report, the Special Rapporteur noted that having regard in particular to the principle nulla poena sine lege, it was necessary, in the absence of an international code of crimes prescribing penalties, that the Statute should, as regards penalties, provide for reference to appropriate national laws such as the national law of the accused or the law of the State in which the crime was committed.

85. Some members stressed that it was necessary in this area to refer to national law since none of the international instruments to which reference might be made provided for penalties. Attention was drawn, in particular, to territoriality, i.e. the application by the court of the penalties stipulated by the criminal law of the State in whose territory the crime was committed. The remark was made in this context that where a State left it to an international criminal court to judge the perpetrator of a crime committed in its territory, that transfer of jurisdiction entailed a transfer of the

provisions of that States's criminal law and of the rules applicable to penalties. It was also said that the territoriality criterion would avoid what might be described as "à la carte" penalties, as might be the case if several persons were accused of having committed the same crime in the territory of the same State and the court decided to apply the penalties stipulated by the criminal law of the State of which each of the accused was a national. A further observation was that referring to national law in connection with penalties would be incompatible with the international nature of the court. Various views were expressed on the Special Rapporteur's proposal that the death penalty should be ruled out.

(xv) Revision and appeal

86. The Special Rapporteur noted that he had in his report presented alternative provisions: one, for revision alone, should, for example, a fact of decisive importance to a case, unknown prior to the judgement of the court, be discovered thereafter; the other for revision, as well as for appeal.

87. The remark was made that a principle of human rights legislation was that it should always be possible to appeal against a judgement pronounced by a court and that revision was, therefore, not sufficient. The view was on the other hand expressed that revision alone would provide enough of a guarantee because of the court's high standards and because the trial would necessarily take place in the presence of international observers and would be reported on at length by the international media. A further observation was that the question of remedies and that of the jurisdiction of the court were closely related and should be dealt with together.

(xvi) Right of pardon and conditional release

88. The Special Rapporteur proposed in his draft statute that the right in question be exercised by the State in charge of executing the sentence, after consultation with the other States concerned. The remark was made that the wording of that proposal did not clearly indicate whether the State in charge of executing the sentence had the initiative for granting pardon and conditional release or whether it had to follow the advice offered in its consultations with the other States concerned.

89. At the end of the discussion on his eleventh report, the Special Rapporteur noted that there was general agreement on the need to provide for a link between the court and the United Nations. He observed that the court, aside from the fact that it would need the United Nations logistical support for its administrative functioning, would have jurisdiction in matters of

direct concern to the United Nations, such as war crimes and crimes against the peace and security of mankind, and would necessarily have to take into account the Charter of the United Nations and the resolutions of the Security Council. As to the applicable law, the Special Rapporteur pointed out that at the Commission's previous session, the Working Group had concluded that the applicable law should be confined to agreements and conventions, a view which he did not share, as his earlier reports made clear. Some matters were not ripe and it would be necessary to have recourse to national law. For instance, no appropriate formulation had yet been found for penalties, which varied greatly, depending on the State and the philosophy involved. If the court was to respect the principle of nulla poena sine lege, it would have to refer to a State's national law when it found that it was faced with a legal vacuum.

90. With regard to the State or States whose consent was necessary for the court to have jurisdiction to try an accused person, the Special Rapporteur noted that differences of opinion had emerged in the Commission. In his view, a court could not be created without taking into consideration the existence and jurisdiction of States. Some form of compromise thus had to be found because the court could only function with the agreement of States. Jurisdiction could perhaps be dependent on acceptance by the State in whose territory the accused was found, for without such acceptance, the court would constantly be judging by default.

91. In the matter of the organization of the court, the Special Rapporteur had no strong views on whether judges should be appointed or elected, as long as they were afforded certain guarantees, for instance, that they could not be removed or could not be sanctioned for the decisions they took.

92. With regard to the prosecution, the Special Rapporteur pointed out that he had proposed a text providing that the complainant State should be responsible for conducting the prosecution, not a prosecutor general. He had done so because experience indicated that, even in courts in which the prosecutor general was responsible for prosecution, the complainant took part in the proceedings, pleading the case and bringing forward evidence in support of allegations made.

93. So far as the investigation procedure was concerned, the Special Rapporteur had proposed that the judicial inquiry be carried out by the court itself, at a hearing. If a case was too complex, a court might appoint a special committee from among its members to conduct the investigation. He

had, however, no objection to an investigative body even though such a body would not make for the small, flexible structure called for by the 1992 Working Group. He viewed the system of the examining magistrate as unsatisfactory because it entailed the risk of arbitrary decisions concerning the freedom of an individual. If the investigation was to respect human rights, the powers of the examining magistrate had to be limited as much as possible and another arrangement had to be found in which the magistrate reached his decision not according to his mood, but in accordance with the law. Hence, in the Special Rapporteur's view, the investigation should be carried out not behind closed doors, but at a public hearing.

94. With regard to the handing over of the accused to the court, the Special Rapporteur indicated that, in providing in the relevant draft article that the State requested must ensure "that the accused does not enjoy immunity from prosecution", he had merely been referring to one of the conclusions of the 1992 Working Group.

95. As to remedies, the Special Rapporteur noted that revision had been generally accepted during the discussion and that no member of the Commission had been categorically opposed to appeal.

2. Establishment of the Working Group on a draft statute for an international criminal court

96. The Commission at its 2298th meeting on 17 May 1993 decided to reconvene the Working Group it had established at the previous session. At its 2300th meeting on 17 June 1993 it decided that the name of the Working Group should henceforth be "Working Group on a draft statute for an international criminal court". [30]

97. The mandate given by the Commission to the Working Group was as provided in paragraphs 4, 5 and 6 of General Assembly resolution 47/33 of 25 November 1992. [31]

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[30] For the composition of the Working Group, see para. 9 above.

[31] See para. 32 above.

3. Outcome of the work carried out by the Working Group on a draft statute for an international criminal court

98. The Working Group referred to in paragraph 45 above submitted a report which was introduced by its Chairman at the 2325th meeting of the Commission on 21 July 1993. The report of the Working Group is annexed to the present report.

99. The Commission considered that the report of the Working Group represented a substantial advance over that of the 1992 Working Group on the same topic presented to the forty-seventh session of the General Assembly. 32/ The present report placed the emphasis on the elaboration of a comprehensive and systematic set of draft articles with brief commentaries thereto. Though the Commission was not able to examine the draft articles in detail at the current session and to proceed with their adoption, it felt that, in principle, the proposed draft articles provided a basis for examination by the General Assembly at its forty-eighth session.

100. The Commission would welcome comments by the General Assembly on the specific questions referred to in the commentaries to the various articles, as well as on the draft articles as a whole. The Commission furthermore decided that the draft articles should be transmitted, through the Secretary-General, to Governments with a request that their comments be submitted to the Secretary-General by 15 February 1994. These comments are necessary to provide guidance for the subsequent work of the Commission with a view to completing the elaboration of the draft statute at the forty-sixth session of the Commission in 1994, as contemplated in its plan of work.

32/ See Official Records of the General Assembly, Forty-seventh session, Supplement No. 10 (A/47/10), paras. 339-557.

CHAPTER III

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

101. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur. 33/

102. The Commission, from its thirty-second (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur. 34/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

103. The Commission, at its thirty-sixth session (1984), also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline 35/ and a study prepared by the

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33/ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic, and to report to it thereon. For the report of the Working Group see *Yearbook ... 1978*, vol. II, (Part Two), pp. 150-152.

34/ For the five reports of the Special Rapporteur, see *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2; *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360; *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373; *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

35/ *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 36/

104. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received eight reports from the Special Rapporteur from its thirty-seventh session (1985) to its forty-fourth session (1992). 37/ At its fortieth session (1988), the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General Provisions) and Chapter II (Principles). 38/ At its forty-first session (1989), the Commission also referred to the Drafting Committee the revised version of those articles which had already been referred to the Drafting Committee at the previous session. 39/

105. At its forty-fourth session (1992), the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic. 40/ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992, took the following decisions:

36/ Yearbook ... 1985, vol. II (Part One) Addendum, document A/CN.4/384.

37/ For the seven reports of the Special Rapporteur, see Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394; Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402; Yearbook ... 1987, vol. II (Part One), p. 47, document A/CN.4/405; Yearbook ... 1988, vol. II (Part One), p. 251, document A/CN.4/413; Yearbook ... 1989, vol. II (Part One), p. 131, document A/CN.4/423; document A/CN.4/428 and Corr.1 and 4 (all languages), Corr.2 (English only), and Corr.3 (Spanish only) and Add.1; document A/CN.4/437 and Corr.1 and document A/CN.4/443 and Corr.1 and Corr.2 (Spanish only).

38/ For the text see Yearbook ... 1988, vol. II (Part Two), p. 9.

39/ See Yearbook ... 1989, vol. II (Part Two), para. 311. Further changes on some of those articles were again proposed by the Special Rapporteur in his Sixth Report, see (Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10) (A/45/10), para. 471.

40/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10, p. 127-129.

"(a) Scope of the topic

(i) The Commission noted that, in the last several years of its work on this topic, it has identified the broad area and the outer limits of the topic but has not yet made a final decision on its precise scope. In the view of the Commission, such a decision at this time might be premature. The Commission, however, agreed that, in order to facilitate progress on the subject, it would be prudent to approach its consideration within that broad area in stages and to establish priorities for issues to be covered.

(ii) Within the understanding set forth in paragraph (i) above, the Commission decided that the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first; only after having completed its work on that first part of the topic would the Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.

(iii) Attention should be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm and the Commission should not deal, at this stage, with other activities which in fact cause harm. In view of the recommendation contained in paragraph (ii) above, the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it will then decide on the next stage of the work."

"(b) The approach to be taken with regard to the nature of the article or of the instrument to be drafted

(iv) In the view of the Commission it would be premature to decide at this stage on the nature of either the articles to be drafted or the eventual form of the instrument that will emerge from its work on this topic. It would be prudent to defer such a decision, in accordance with the usual practice of the Commission, until the completion of the work on the topic. The Commission will examine and adopt the articles proposed for this topic, in accordance with its usual practice, on the basis of the merits of the articles, their clarity and utility for the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in this area."

"(c) Title of the topic

(v) In view of the ambiguity in the title of the topic as to whether it includes 'activities' or 'acts', the Commission decided to continue with its working hypothesis that the topic deal with 'activities' and to defer any formal change of the title, since in the light of the future work on

> the topic additional changes in the title may be necessary. The Commission will therefore wait until it is prepared to make a final recommendation on the changes in the title."
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> "(d) Recommendation on the report of the Special Rapporteur for the next year
>
> (vi) The Commission took note with thanks and appreciation of the previous reports of the Special Rapporteur in which the issues of prevention were examined in respect of both activities having a risk of causing and those causing transboundary harm. It requested that the Special Rapporteur, in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect. [41]"

B. Consideration of the topic at the present session

106. At the present session, the Commission considered the Special Rapporteur's ninth report (A/CN.4/450), at its 2300th and 2302nd to 2306th meetings held between 25 May to 11 June 1993. At the conclusion of the discussion summarized below (paras. 108-192), the Commission decided to refer article 10 (Non-discrimination), which the Commission had examined at its forty-second session (1990), and articles 11 to 20 *bis* proposed by the Special Rapporteur in his ninth report to the Drafting Committee to enable it to continue its work on the issue of prevention, as the Commission had decided at its preceding session. The Commission indicated that the Drafting Committee could, with the help of the Special Rapporteur, take on a broader task and determine whether the new articles which had been submitted came within a logical framework and were complete or, if they were not, whether they should be supplemented by further provisions. On that basis, the Drafting Committee could then start drafting articles. Once it had arrived at a satisfactory set of articles on the prevention of risk, it might see how the new articles were linked to the general provisions contained in articles 1 to 5 and the principles embodied in articles 6 to 9 and in article 10. The Drafting Committee devoted nine meetings to the articles. Its report (A/CN.4/L.487 and Corr.1 (French and Spanish only)) was introduced by the Chairman of the Committee at the 2318th meeting of the Commission. It contained the text of the articles adopted by the Committee on first reading namely articles 1 (scope of the present articles), 2 (used terms), 11 (prior authorization), 12 (risk assessment) and 14 (measures to minimize the risk). However, in line

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[41] Ibid.

with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time, it will have before it the material required to enable it to take a decision on the proposed draft articles. At the present stage, the Commission merely took note of the report of the Drafting Committee.

107. At the request of the Commission made last year (see para. 105 above), the ninth report of the Special Rapporteur was devoted entirely to the issues relating to the prevention of transboundary harm of activities with a risk of such harm. In that report, the Special Rapporteur described what he considered to be the nature and the content of the concept of prevention and proposed 11 articles (arts. 11 to 20 bis). 42/ In his oral introduction to the report, he referred to the articles which were already before the Drafting Committee 43/ on the General Provisions and on the Principles which dealt with broader issues relating to the topic and indicated that those articles were also relevant, subject to some minor drafting modifications, to the issue of prevention of transboundary harm in respect of activities with a risk of such harm. He also referred to an article 10 which he had proposed in his sixth report under the title of "non-discrimination" 44/ and explained the relevance of that article to the issue of prevention now under consideration.

1. Issues of a general character

108. Some members expressed doubts about the Commission's decision made last year to deal with this topic in stages. Accordingly, in their view, at the

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42/ For the text of the articles see notes 46, 47, 49-51, 53, 54 and 56-59 below.

43/ For those articles see Yearbook ... 1989, vol. II (Part Two), pp. 84-85.

44/ Document A/CN.4/428, p. 44. Article reads as follows:

"Article 10

Non-discrimination

"States parties shall treat the effects of an activity that arises in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of these articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by the activities referred to in article 1."

current stage, the Commission had to deal only with activities having a risk of causing transboundary harm which unnecessarily narrowed the scope of inquiry and created conceptual difficulties.

109. Those members noted that a view was emerging in the Commission that, once the articles on preventive measures had been fully developed, it might suffice for the Commission to conclude that it might be unnecessary to proceed to the second phase of the work, namely, the formulation of rules on compensation for damage. The Commission should keep in mind the more general perspective and, specifically, that second phase of its work.

110. It was felt that the Commission should not encounter any major difficulty during the second phase, since it appeared to agree on some of the basic propositions, for instance, that the victims of transboundary harm should, whatever the modalities of compensation, be adequately and expeditiously compensated and that the actors in a transboundary harm scenario would generally be the "State of origin", the governmental or non-governmental operator of the activity, the affected State, those who benefited from the activity, and the victims of the transboundary harm. The Commission therefore would only have to make proposals to ensure equitable relationships at the primary rule level between the various players in cases where transboundary harm had in fact been caused.

111. It was stated that before making its final proposals on the rules or principles on compensation for harm, the Commission would have to consider a variety of possibilities. For example, the criteria to be applied in determining whether or not due diligence had been exercised in a particular case should include consideration of whether the operator had been adequately insured against all possible harm. In certain circumstances, there should be a presumption in favour of the affected State. In addition, the Special Rapporteur had made a very interesting proposal in draft article 9 whereby there would be an obligation on the State of origin to provide compensation for the harm caused, but the actual amount of the compensation would be decided in negotiations, held in good faith, between the parties. Some thought should also be given to the role of industry-wide mechanisms for the funding of compensation, which had enjoyed remarkable success in the field of marine oil pollution.

112. According to another view, prevention was not the whole of the topic, but it was the topic's most firmly established part. States which conducted or authorized activities likely to cause harm in the territory of other States or

in international areas were bound by an obligation of prevention, which consisted in doing everything in their power to prevent such harm from occurring or, if it did occur, to minimize the harmful effects. Such was the positive law, as already illustrated by case law, starting with the arbitral award in the Trail Smelter 45/ case. On the other hand, it did not seem possible to say that States had an obligation of reparation in the event of harm or that the time was ripe to develop the law in that direction.

113. The relationship between this topic and State responsibility became the subject of comments by some members. It was stated that one of the problems with proceeding rapidly with this topic was the uncertainty about its autonomy. Imposing obligations of prevention on States implied that violation of those rules incurred State responsibility. In that connection, it was considered useful to recall the two different meanings of the word "responsabilité". In the sense of "responsibility", it referred to the mechanism that could lead to reparation, but, in the sense of "liability", it meant being liable for a person, a thing or a situation. In the case of activities conducted in the territory of a State, a distinction had therefore to be drawn between, on the one hand, unlawful activities for which States were responsible within the first meaning of the term and which came under the draft articles on State responsibility and, on the other hand, activities which were not prohibited and therefore not unlawful a priori, for which States were also "liable" within the second meaning of the term, the first consequence of such liability being the obligation to prevent transboundary harm. According to one view, the statement in paragraph 2 of the ninth report to the effect that prevention did not form part of liability was thus very much open to discussion. Quite the contrary, prevention was at the very heart of liability and it was because the State was liable for activities conducted in its territory that it had the legal obligation to prevent the transboundary harm that might result from them. That principle was so important that it might be worthwhile stating it formally at the beginning of the articles on prevention.

114. The remark was made that unlike the topic of State responsibility, where the State was accountable for its failures as a State, and unlike the topic of the Law of the non-navigational uses of international watercourses, where the

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45/ United Nations, Reports of International Arbitral Awards, vol. III, p. 1905.

State owned, regulated and maintained the natural resource, international liability was concerned with acts over which the State might not, or could not, have control. That was because of the human rights and freedoms enjoyed by individuals, because of the need to separate the State from other entities engaged in production, commerce and services, and because of the need to meet the demands of entrepreneurs in terms of the technology and financial resources needed to promote development. There was, inevitably, some hesitation in accepting the view that States should be liable for activities that caused transboundary harm, since it was felt that, in the interests of allowing market forces free play, excessive regulation was to be avoided. The basic principle that no State should allow its territory to be used so as to cause transboundary harm was so well accepted as to need no repetition, provided the causal connection between the activity and the transboundary harm was well-established. Accordingly, the position of the State involved was governed by State responsibility, while the position of the operator or the owner was well regulated by the law of tort and the law of agency. Any principle the Commission might indicate as a basis for laying down the consequences of liability at the international level could not, therefore, be altogether dissociated from those branches of the law.

115. It would perhaps be easier, it was stated, to prescribe the appropriate rules on prevention, both for the State and for other entities, if the State was dealt with separately from the operator or owner. The State's role, as noted by the Special Rapporteur, was essentially to prescribe standards and to enact and monitor the implementation of laws and regulations. The role of the operator was different and more demanding. His obligations could be, among others, to submit an environmental impact study of the activity concerned, to give an indication of the level of risk entailed, to propose measures to deal with such risk and to contain any consequences. If an activity was likely to cause transboundary harm, a requirement could also be laid down that the activity should be carried out in such a way that it would cause no foreseeable harm to another State or the operator could be required to obtain the necessary authority to carry out the activity after engaging in consultation with those responsible in the State or States concerned.

116. A few members commented on the difficulty of drafting articles with a scope so broad as to be applicable to any kind of activity with transboundary harmful effects. They felt that it would be necessary to identify the classes of activity which would fall under the future instrument. The new article 11

proposed by the Special Rapporteur simply referred, in that connection, to former article 1, which, even in conjunction with article 2 (Use of terms), hardly filled that lacuna. Article 1 spoke of activities involving risk, while article 2 explained that what was meant was the risk of appreciable transboundary harm. But all kinds of activities could cause transboundary harm and the Special Rapporteur should have identified the different categories of such activities instead of proposing rules which could apply only to specific groups of activity, for instance, the building of nuclear power plants. If there was one general lesson to be learned from environmental law, it was certainly that preventive efforts must always be adapted to the specificities of the danger to be combated.

117. In that connection, it was explained that in order to prevent the danger from materializing, the international community needed hard rules that went beyond the 1972 Stockholm Declaration and the 1992 Rio Declaration. In addition, the areas in which there was still a regulatory deficit should be identified. Admittedly, the Special Rapporteur referred to the Convention on Environmental Impact Assessment in a Transboundary Context and to the Convention on the Transboundary Effects of Industrial Accidents, but he had not discussed the impact of those two instruments on his topic - an impact that was perhaps considerable. Perhaps, too, he should have explained how he conceived the relationship between the rules he proposed and the often fairly detailed provisions of the 1982 United Nations Convention on the Law of the Sea.

(a) Concept of risk

118. The Special Rapporteur explained that activities involving risk were chiefly those which may cause transboundary harm due to accidents. Therefore, the cause of transboundary harm was essentially limited to circumstances where the control over these activities, for various reasons, was somehow lost. The articles he had proposed in his ninth report were designed to deal specifically with this type of activities. The Special Rapporteur took note of concerns expressed in the previous sessions of the Commission to the effect that it was difficult in some cases to assess whether a particular activity had a risk of transboundary harm. In his view, in a large number of cases, it was possible to consider whether an activity which had particular features that involved risk was likely to cause transboundary harm, through examination of substance handled, the technology used in it and particular circumstances in which the activity was conducted. In his view, the obligation of due

diligence in taking preventive measures, such as providing information, notification, consultation, etc. seemed to apply to all different types of activities with a risk of causing transboundary harm.

119. A few members found the concept of risk much too broad and, consequently, the scope ratione materiae of the articles unclear. In their view, the Commission should attempt to identify classes of activities to which the articles on prevention would apply. In their view, the articles on prevention were essentially directed at establishing an environmental impact assessment system, which was certainly not suitable for all activities involving risk; it would be relevant only with regard to planned works whose dimensions went beyond a certain threshold that must itself, be carefully defined. It was significant, they thought, that all existing instruments attempted to describe in precise detail the activities to which they applied. The general concept of activities involving risk might well be suitable when liability for harm was being considered. Yet a procedure for assessment of environmental impact must be confined, on account of its very nature, to certain easily identifiable activities which, when carried out in isolation, involved a specific risk of transboundary harm.

(b) Issues relating to the question of prevention

120. In the ninth report, the Special Rapporteur defined preventive measures as those which attempted to: (a) ensure that activities under the jurisdiction or control of a State were carried out in such a way as to minimize the probability of an accident which would have transboundary effects, and (b) reduce the harmful effects resulting from the accident. Therefore, the objective of preventive measures was twofold. The Special Rapporteur underscored the words "to attempt" in order to emphasize that the purpose of the obligation is not to prevent the occurrence of any harm - something which he found by definition problematic, since the activities involved were those which had a risk of causing harm - but to compel the States to take certain actions in order to minimize the risk of accidents and their transboundary harmful consequences. Thus the function contemplated for a State in its preventive measures was limited to setting forth prudent and comprehensive rules including enactment of laws and administrative regulations and enforcing them in respect of undertakings, under its jurisdiction or control, of activities with a risk of causing transboundary harm.

121. Under this arrangement, the Special Rapporteur explained, a State was not, in principle, liable for private activities in respect of which the State

had carried out properly and reasonably its supervisory functions. Those supervisory functions were spelled out in the articles that he had proposed and included, for example, granting prior authorization for the conduct of the activity only upon receiving a satisfactory assessment report of the activity, making sure that certain measures were provided for in order to reduce accidents, etc. The Special Rapporteur explained that the statement, that a State was not, in principle, liable for private activities, was intended to keep the possibilities open for certain cases where the State might have residual liability. Those cases included, for example, where the operator or his insurance lacked financial ability to pay the total amount of compensation. Such a model was already followed in some conventions. He did not wish to elaborate on whether or not such a residual State liability was appropriate for the topic at this time, since the matter would have to be examined when dealing with the question of liability which the Commission will be examining at a later stage.

122. As regards the nature of the provisions setting forth measures of prevention, the Special Rapporteur explained that those provisions, in his view, constituted "due diligence", and would be deemed to be unfulfilled only where no reasonable effort was made to fulfil them. Therefore, those provisions were not of the nature of what might be called the obligation of result, in the sense of articles 21 and 23 of Part One of State Responsibility, requiring the prevention of a given event.

123. The Special Rapporteur noted the inequality between developing and developed States in their ability to comply with the obligation of prevention and their potential liability in case of transboundary harm. He expressed his agreement with the point which had been repeatedly made to the effect that developing countries lacked the financial and technical resources to monitor the activities of multinational corporations which were often responsible for conducting activities with a risk of transboundary harm. To remedy the situation, the Special Rapporteur suggested to include a provision in the part of the articles dealing with principles which would require, in general terms, that the special situation of the developing States should be taken into account in formulating any regime to prevent transboundary harm.

124. He also referred to the suggestion he had made in his previous reports to the effect that a role should be contemplated for international organizations in these articles in terms of providing assistance to developing countries in assessing the transboundary effects of activities with a risk of transboundary

harm or assisting those States in evaluating assessments done by other States contemplating undertaking such activities that might affect developing States. He expressed his concern as to how international organizations, which were not parties to these articles may be required to provide assistance in accordance with these articles. He could think of some organizations that were capable of playing a useful role in assisting developing States. They included, for example, the United Nations Environment Programme, the Economic Commission for Europe, the Food and Agricultural Organization, the World Health Organization, the United Nations Development Programme etc.

125. Comments on the question of the obligation of prevention dealt with the content of prevention, the structure of the articles on prevention and the special situation of the developing countries.

126. As regards the content of the obligation of prevention, some members felt strongly that the concept of prevention should be limited to the obligation to prevent the occurrence of transboundary harm or what might be called prevention *ex ante*. These members, in principle, did not disagree with the idea of an obligation to containing or reduce the extent and scope of the harm once such harm occurred, but they believed that such measures were really in the nature of reparation for, or correction of, harmful effects, and could therefore more suitably be covered at the next stage in the Commission's work.

127. The comment was made that, from the ninth as well as the previous reports, it seemed that the Special Rapporteur endorsed the view that the legitimacy of all measures defined in the framework of this topic, including preventive measures, was based on the fact that every State was prohibited from using its territory for purposes contrary to the rights of other States. That hypothesis might, however, be a source of misunderstanding, since any activity capable of causing harm to another State could be regarded as an unlawful activity and it could then be asked whether what was involved was not simply State responsibility for wrongful acts.

128. The remark was also made that the Commission had to formulate residual rules applicable to liability for the consequences of the activity within the State which arose independently of its will. The very legal basis of these obligations was the sovereign equality of States. Therefore the Commission must, in its role of codifying international law, produce a legal framework into which activities involving risk could be fitted and which would give States and the courts the necessary points of reference. Governments must know that, when they acted within their borders, they were also assuming

international obligations and responsibilities. The draft articles should therefore be as general as possible so as not to distort the obligation of prevention through legalistic or excessive procedures, which would not reflect the true situation. States did not expect a detailed and binding procedure, but rather the enunciation of general obligations on which they could draw in deciding on their relations in that regard.

129. As regards the structure of the articles on prevention, a number of comments were made.

130. It was noted that in the ninth report, the Special Rapporteur dealt only with the technical articles without providing an overall picture of the obligation of prevention. Several provisions in his previous reports now before the Drafting Committee were also relevant to issues of prevention. Together with some elements from those provisions, a homogeneous whole on prevention could have formed the first part of the draft articles, possibly to be followed by further parts on reparation and on the settlement of disputes. Some principles could have been enunciated, starting with the obligation of prevention linked to liability as a result of the risks involved in the activities envisaged. That would mean combining article 3, paragraphs 1, 6 and 8 including the provisions of article 2 (a) and (b), already referred to the Drafting Committee, in that part of the draft. It might also be necessary to include an article in the general part on risks to areas not under the national jurisdiction of States (global commons).

131. According to the same view, having set the principles as indicated in preceding paragraph, the modalities for implementation could be indicated. Such modalities could be classified under six separate headings: first, notification, information and the limits thereto; secondly, assessment, taking account of the views of other potentially affected States - and, possibly, international organizations - and of the balance of interests; thirdly, authorization, which would be made contingent on insurance effectively covering risks; fourthly, the maintenance of the obligation of vigilance after the start of activities and the question of activities already in progress at the time of the adoption of the future convention; fifthly, the possible grouping of all provisions relating to the cessation and limitation of harm, which could be described as prevention ex post; and, sixthly, the explicit statement of another basic general principle, namely, that, if the State in

whose territory the activity involving risk took place did not fulfil its obligations of prevention, its liability for failure to do so would be incurred.

132. Still on the structure of the articles, doubts were expressed by a few members as to whether the requirement of notification and information on activities envisaged by a State without taking account of the views of another State, as well as consultations, could be considered measures for the prevention of possible harm. The obligation to provide information could be unnecessary in some cases and indispensable in others. The launching of satellites, for example, was an activity involving risk that could cause transboundary harm, but the communication of technical information on that activity was indispensable only if the satellite had a nuclear power source on board, which would increase the risk of harm. This was the reason, according to this view, for the difficulty in drafting an instrument which could be applicable to all activities.

133. As regards the provisions on information and consultation and other interactions between the States concerned, a question was raised as to whether, in a case in which a foreseen risk did materialize, the State which suffered harm or its nationals would be deemed to have had knowledge of, and to have acquiesced in, the possibility of the occurrence of transboundary harm. Presumably that was not the intention, but the point could be resolved through drafting.

134. As regards the situation of the developing countries, the following comments were made. It was noted that the developing countries, on account of their lack of adequate resources and technology, might find the obligations imposed by the articles unduly onerous. Why should a developing country be obliged to ensure that a transboundary impact assessment was undertaken in respect of an activity taking place in its territory, to carry out consultations with potentially affected States and to design and implement preventive measures for activities that were inherently lawful and beneficial to its economy because they generated employment? The fact that the activities were often undertaken by transnational corporations over which the developing host country did not have sufficient effective control would not make it any easier for some of those countries to accept the obligations imposed by the articles. In another forum of the United Nations, it was recalled, developed States had staunchly resisted the adoption of a code of

conduct for transnational corporations which would, inter alia, oblige such entities to conduct their activities in accordance with environmentally sound practices.

135. As regards the Special Rapporteur's suggestion that some general form of wording should be included in the chapter on principles to take account of the situation of the developing States, one view expressed was that it did not go far enough. The need of developing countries for preferential treatment should also be reflected in the articles on prevention, which should take account, in particular, of the principles laid down in the Rio Declaration on Environment and Development. Also, with regard to preventive measures, the standards which applied to developed countries might be unsuitable for developing countries, since the cost, in social and economic terms, might be so great as to impede their development. The articles on prevention should include general provisions on ways of facilitating the transfer of technology, including new technology, in particular from the developed to the developing countries.

136. The remark was also made that as conceived in the proposed draft articles, the principle of prevention did not take account of the situation of those countries with regard to access to industrial technology; the resulting undifferentiated implementation of primary rules might give rise to a new type of condition being posed for the transfer of technology that might well make the developing countries increasingly hesitant about acceding to the system advocated within the framework of the United Nations. The Commission must bear those facts in mind by including special provisions for the developing countries while not compromising the universality of the proposed system. It was noted that the Special Rapporteur was not indifferent to those concerns, as he had shown in his report. He had proposed to include a provision in the chapter on principles. It was to be hoped that the formulation of such a provision would not be unduly general and abstract.

137. It was also stated that the Commission should keep in mind the lack of sufficient technology and human resources in the developing countries. Yet, at the same time, the need for vigilance must be impressed on developing countries, since the harmful effects of accidents in their territories would usually affect other developing countries that were themselves lacking in technological and financial resources. The old adage "An ounce of prevention is worth a pound of cure" was especially apt in that context, particularly as

prevention costs less. So, while prevention must be emphasized, developing countries must be helped in acquiring the necessary technological competence and resources to carry out risk assessment.

2. Specific articles

(a) Article 11. Prior authorization 46/

138. Article 11 would provide that activities with a risk of transboundary harm require the authorization of the State within whose territory or jurisdiction they are conducted; and that authorization should be obtained prior to commencement of major modification of the activity. In the view of the Special Rapporteur, the requirement of prior authorization was the first step a State took in order to exercise its supervisory functions and responsibility. The Special Rapporteur stated that he had taken note of reservations made by some members of the Commission in the previous sessions on this requirement. Those reservations were based on the argument that (a) such a requirement interfered with the domestic affairs of States; and (b) this was a matter that States complied with routinely because of their own interests, given that in case of an accident they themselves would be first to suffer damage. The Special Rapporteur did not find this reasoning persuasive enough to delete article 11. In his view, the activities covered under this topic had the potential of affecting the rights of a State other than the State where they were being carried out. Such a requirement had, therefore, only the effect of balancing the rights and the obligations of the States involved and could not be interpreted as interfering in the domestic affairs of the State of the origin. In addition, he found little comfort for the affected State in knowing that the State of the origin had also suffered damage as a result of the accident. He also believed that there might be cases where the State of origin might conduct activities with a risk of

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46/ Article 11 reads as follows:

Article 11

Prior authorization

The activities referred to in article 1 shall require the prior authorization of the State under whose jurisdiction or control they are carried out. Such authorization shall also be required when a major change in the activity is proposed.

potential harm in ways that would minimize harm to itself and expose its neighbour to more of such potential harm, for example by conducting these activities near border areas.

139. Many members supported article 11 even though it seemed at first glance to state the obvious. In their view, it put the State and the operator on notice. To some members article 11 as well as 12, 13 and 14 seemed too detailed and might ultimately mean that the legal regime of prevention would amount to interference in the domestic affairs of States.

140. The remark was made that article 11 gave rise to two problems. The first related to the definition of the concept of risk. Only in the light of that definition could it be said whether States could reasonably be expected to accept prior authorization as a general obligation. The second problem related to the periodic renewal of the authorization or the possibility, or even the obligation, to withdraw it in certain cases, which was nowhere expressly provided for.

141. It was also noted that the requirement of prior authorization should be examined within the larger trend in international relations on economic and trade issues. The trend in international agreements was to require States to adopt legislation on specific issues in order to ensure that specific obligations were carried out. To protect themselves, and in view of the realities of modern-day life, States tried to impose liability on the operator, who was usually in the best position to exercise supervision. That led to an impasse, however. If a State imposed too many regulations on operators, it could be accused of impeding private investment. Yet if it refrained completely from regulating economic activities, it could be held liable for accidents occurring in its territory. Therefore, two standards would have to be set: one for States that were able to exercise the controls stipulated in an agreement, and another for those that lacked the necessary scientific and technical infrastructure. Increasingly, international agreements demanded that prior notice be given and consultations be held before certain activities were carried out. The provisions imposing obligations on States should be drafted carefully, taking into account the need for a proper balance between a certain degree of freedom necessary for private operators and the State obligations to prevent transboundary harm.

(b) Article 12. Transboundary impact assessment 47/

142. Article 12 would provide that a State require that an assessment of the possible transboundary impact of an activity be undertaken before an activity is authorized. The Special Rapporteur explained that such a requirement was not novel and was already incorporated in some of the most recent legal instruments on the environment. 48/ In his view, assessment did not require that there must be certainty that a particular activity would cause significant transboundary harm, but only certainty that a significant risk of such a harm existed.

143. The Special Rapporteur explained that he believed that assessment, the subject matter of this article and, the requirements of exchange of information and consultation covered by articles 15, 16 and 18 are closely linked. All are geared to an objective which is very important for the purposes of an effective prevention regime, namely encouraging the participation of the State presumed to be affected so that it can help to ensure that the activity is carried out more safely in the State of origin and at the same time be in a position to take more precautions in its own territory to prevent or minimize the transboundary impact. Cooperation, in the view of the Special Rapporteur, is an essential part of these obligations.

144. The comment was made that the requirement of environmental impact assessment played an important role in these articles. Article 12 should therefore be spelled out, perhaps in some detail, so that the essential components of a good environmental impact assessment were clearly defined. Precedents for such definitions existed, both in conventions and in decisions

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47/ Article 12 reads as follows:

Article 12

Transboundary impact assessment

In order to obtain the authorization referred to in article 11, the territorial State shall order an assessment to be undertaken of the possible transboundary impact of the activity and of the type of risk that impact will produce.

48/ Reference to that effect was made to principle 17 of the Rio Declaration on Environment and Development of 1992 (A/CONF.151/26/Rev.1 (vol.1, p. 3)), article 4 (2) of the Convention on the Transboundary Effects of Industrial Accidents of 1992 (International Legal Materials, vol. 31, p. 1330) and article 2 (2 and 3) of the Convention on Environmental Impact Assessment in a Transboundary Context of 1991 (E/ECE/1250).

of the UNEP Council. Unless the essential requirements were thus identified, there was a risk that a State might appear to have fulfilled its obligations by carrying out a study of some kind, whereas, in reality, it had totally failed to have the potential risk properly assessed.

145. It was stated that the consequences of an adequate assessment could differ. First, if the assessment revealed that no risk existed and the State therefore did not notify any neighbouring State and authorized the activity, what liability would ensue if, notwithstanding the assessment, harm to a neighbouring State did occur? Would the State which had carried out the assessment be immune from any suit in respect of the harm caused, or could the injured State still bring a suit, claiming either that the assessment had been faulty or that the first State's conclusions on the basis of the assessment had been wrong? Second, if the assessment did reveal a risk of significant harm, the State of origin was required only to notify the affected State or States of the situation, but not to transmit the actual assessment. Why was that so? The reason could hardly be a matter of national security and industrial secrets, something that was dealt with separately in article 17. The participation of the public, a matter mentioned in paragraph 37 of the report, would appear to rule out such considerations. To ensure that the State gave sufficient and adequate information to the affected States, it might be necessary to introduce a provision to the effect that failure by the State of origin to communicate information to a neighbouring State, which proved in due course to be essential to any assessment of the risk, would in itself constitute grounds establishing the liability of the first State.

146. Some members felt that the assessment should be the responsibility of the operator, while some others felt that the prevention of major risks was the responsibility of the State. According to a few members, it was for the State to decide how it should proceed with preventive obligations; article 12 was, therefore, unnecessary.

147. It was also noted that the relationship between articles 12 and 15 was unclear, because article 15 gave the impression that, even if the assessment required under article 12 showed a possibility of substantial transboundary harm, the State could nevertheless give its authorization within the meaning

of article 11. But why, in that case, should it be required to notify the other States of the results of the assessment? Further clarification was therefore necessary.

(c) Article 13. Pre-existing activities [49]

148. Article 13 would provide that should it happen that an activity with a risk of transboundary harm is being conducted without authorization required under article 11, the State within whose territory or jurisdiction the activity is being conducted must require that an authorization under article 11 be obtained.

149. It was noted that article 13, extended the scope of international liability to pre-existing activities, which may have continued for several years without ever causing harm; that presupposed that they had not involved any significant risk at the outset. To make such activities subject to the requirements envisaged might therefore create difficulties in the relationship between the State and the operators, since the new demands of the State with respect to prevention could be regarded as a departure from the initial undertakings or as a modification, implied or otherwise, of the investment contract.

150. According to one view, when a State discovered that an activity that might cause transboundary harm was being carried out under its jurisdiction without authorization, the most appropriate response would be not only to warn those responsible, but also to enjoin them to comply with the established requirements. In its present wording, the article merely provided for the issuance of a warning: a stronger tactic should be adopted.

151. To a few members, the article seemed unclear. It might be better to state that the continued exercise of such activity was without prejudice to the question of State responsibility. It was also noted that once the State

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[49] Article 13 reads as follows:

Article 13

Pre-existing activities

If a State ascertains that an activity involving risk is being carried out without authorization under its jurisdiction or control, it must warn those responsible for carrying out the activity that they must obtain the necessary authorization by complying with the requirements laid down in these articles. Pending such compliance, the activity in question may continue on the understanding that the State shall be liable for any harm caused, in accordance with the corresponding articles.

had undertaken new obligations to allow certain activities to be conducted on its territory, with due regard to its duties towards other States and to environmental considerations, it should normally prohibit any activity that did not meet those standards. In any event, it was generally the operator, not the State, that would be required to pay for any damage caused.

(d) Article 14. Performance of activities [50]

152. Article 14, referred to by the Special Rapporteur, as the core of the articles on prevention, would require, in the first instance, that a State ensure, through legislative and other measures, that an operator involved in undertaking the types of activities covered by this topic, has used the best available technology, to minimize the risk of significant transboundary harm; and in the event of an accident, harm is contained and minimized. States under this article are also required to encourage operators to take compulsory insurance or provide other financial guarantees enabling them to pay for compensation.

153. While, in principle, the core of article 14 was found acceptable by many members, its scope and drafting led to a number of comments.

154. The remark was made that another important factor from the point of view of the State in whose territory the activities were carried out was that the highest obligation that the articles should impose on it was one of "due diligence", which the report of the Special Rapporteur defined as obligations deemed to be unfulfilled "only where no reasonable effort is made to fulfil them". The essence of the State's obligation was thus to carry out its supervisory function by putting in place appropriate legislative, administrative and enforcement measures in respect of the activities being undertaken in its territory. It was, however, open to question whether the wording of article 14 sufficiently conveyed "due diligence" as distinct from

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[50] Article 14 reads as follows:

Article 14

Performance of activities

The State shall ensure, through legislative, administrative or other measures, that the operators of the activities take all necessary measures, including the use of the best available technology, to minimize the risk of significant transboundary harm and reduce its probable scale or, in the event of an accident, to contain and minimize such harm. It shall also encourage the use of compulsory insurance or other financial guarantees enabling provision to be made for compensation.

an absolute obligation. If a State adopted the necessary legislative and administrative measures, which, if applied by the private operator, would minimize the risk of significant transboundary harm and reduce its probable scale or, in the event of accident, contain and minimize such harm, and, if the operator failed to comply with those measures, would the expression "ensure" that operators "take all necessary measures" mean that the State was in breach of the obligation imposed by the article? Surely the State should not be responsible in such cases and the wording of article 14 should be revised accordingly.

155. As regards the meaning of prevention, it was stated that the article should deal only with prevention before any damage occurs. The problem of prevention ex post related to liability in the strict sense, with the cessation of the activity, compensation for harm caused, etc.; that was another question, which came under the second part of the topic, namely, corrective measures. Therefore the narrow concept of prevention should be adopted in this article and should be amended to read: "The State shall, through legislative, administrative or other measures, allow on its territory only the activities of operators who take all necessary measures, including the use of the best available technology, to minimize the risk of transboundary harm. It shall make the conduct of such activities subject to the use of insurance commensurate with the risk incurred".

156. The view was also expressed that article 14 conditioned the right of a State to conduct activities with extraterritorial effects within its territory with caution and vigilance before authorizing the activities and while the activities were being undertaken. This article therefore seemed to involve progressive development of the law, with regard to which the requirement of insurance was helpful.

157. According to another view the obligation imposed under the article was for the State to prescribe a duty or duties for the operator to undertake; it was not an obligation to ensure that the operator, in fact, carried out those duties. Should the operator fail to do so, the obvious sanction would be for the State not to authorize the activity.

158. As regards the insurance requirement, it was stated that it would be useful, as indicated in article 14, that States require the use of insurance. A comment was made to the effect that insurance was essentially a private sector matter and could not form the subject of an international obligation with respect to a risk which might or might not be commercially insurable.

(e) Article 15. Notification and information 51/

159. Article 15 would provide that should an assessment of an activity reveal the possibility of significant transboundary harm, the State of origin would be required to so inform the State or States likely to be affected should an accident occur, and provide them with the results of the assessment. Where there is more than one potentially affected State, assistance of competent international organizations may be sought. States are also required, whenever possible and appropriate, to provide those sections of the public likely to be affected with such information as would enable them to participate in decision-making process relating to the activity. The ninth report mentions three recent legal instruments on the environment which contained similar provisions. 52/ The Special Rapporteur noted that there seemed to be a principle common to many of the instruments dealing with transboundary effects of activities. That principle encouraged participation by individuals and

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51/ Article 15 reads as follows:

Article 15

Notification and information

If the assessment referred to in the preceding article indicates the possibility of significant transboundary harm:

(a) The State of origin shall notify the States presumed to be affected regarding this situation and shall transmit to them the available technical information in support of its assessment;

(b) Such notification shall be effected either by the State of origin itself or through an international organization with competence in that area if the transboundary effects of an activity may extend to more than one State which the State of origin might have difficulty identifying;

(c) Should it later come to the knowledge of the State of origin that there are other States presumed to be affected, it shall notify them without delay;

(d) States shall, whenever possible and as appropriate, give the public liable to be affected information relating to the risk and harm that might result from an activity subject to authorization and shall enable such public to participate in the decision-making processes relating to those activities.

52/ Article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context; articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents, and principle 19 of the Rio Declaration on Environment and Development. For reference see note 48 supra.

private entities th would presumably be affected in making decisions about the conduct of activities with a risk of significant harm; both in the State of the origin and, under the principle of non-discrimination, in the potentially affected State. Taking into account the considerable diversity in development and political and social awareness among States, this particular aspect of the obligation, in the view of the Special Rapporteur, should be conditioned by the words "whenever possible and an appropriate".

160. The Special Rapporteur noted that, in an earlier version of this article, he had proposed that the State of origin should provide information and notification to the potentially affected State "as soon as possible". He removed that temporal requirement from the new version of the article since some members of the Commission were not sure that it would always be possible in relation to certain activities. He himself, however, believes that such a temporal requirement is useful and could be worked out in the article.

161. Most members who commented on the article supported the principle of notification and information, but expressed concerns about the scope of the article and the practical application of the obligation contained in it.

162. It was agreed that when assessing transboundary effects and before the authorization was given, it would be logical for the State in whose territory the activity is going to take place to inform and consult the States concerned. The information communicated to other States should relate not only to assessment, but also to the decision which the State was going to make. The article should therefore be redrafted to specify the purpose of the notification and information.

163. As for preliminary notification and consultation, the comment was made that it would not be wise or realistic to try to impose a precise obligation on States in connection with information to be made public at the domestic level. The supply of information to other States should be governed by the two fundamental principles of good faith and good neighbourliness, which were more a matter of conduct than of the means employed. Besides, the State of authorization did not always need to become directly involved in satisfying the other States likely to be affected: the burden of providing the necessary information and engaging in consultation could therefore be left, at least in the initial stages, to the operator.

164. Some members felt that the article required additional clarification. For example, it should be clear in the article that the State of origin might sometimes be unable to determine in advance which States might be at risk.

Also what mechanism would have to be used to discharge the obligation to involve the public in the decision-making process? A few members expressed reservation on the requirement of informing the public. In their view, it was up to each State to decide who should be informed and how.

165. Several members did not agree with the basic obligation imposed by article 15. In their opinion, the State of origin did not have to notify the other States of the conclusions of its assessment: instead, it should inform them of the content of its legislation and the measures it had taken to ensure that the activities were consistent with that legislation. In the same context, it was questioned whether notification and information had to be made officially. In any case, in the view of the members, the State of origin could not reasonably be expected to refrain from undertaking a lawful activity, especially when that activity was deemed indispensable to the country's development and when there was no other solution.

166. Various views were expressed regarding the assistance of international organizations to developing countries in the context of this article.

167. According to one view, special treatment should be accorded to developing countries so far as the assessment of transboundary effects and measures of notification and information were concerned and an assistance programme should be established to provide them with funds and technology. Such a programme and such treatment should be the subject of special provisions, similar to articles 202 and 203 of the United Nations Convention on the Law of the Sea. It should also be compulsory for the operators to take out insurance, so as not to impose a financial burden on States in a case of transboundary harm.

168. According to another view, article 15 dealt, appropriately, with the role that international organizations could play, but restricted that role to notification and information. However, notification was something for the States concerned, except in certain cases. International organizations, with their financial and technological resources, could provide assistance in many other areas, such as preventive measures and risk assessment. Their involvement should therefore be envisaged, and the conditions for such involvement should be outlined in a separate article or articles. One of the major concerns would be to prevent States from obstructing action by international organizations if it was justified, and to ensure that they agreed on the way in which such action was to be carried out.

169. Again, as regards international organizations, concerns were expressed about the possibility of imposing any obligation at all on "an international

organization with competence in that area" and even about whether such organizations should be referred to, except where, like the Seabed Authority, IMO or ICAO, they dealt with areas outside the jurisdiction of States.

(f) Article 16. Exchange of information [53]

170. Article 16, to facilitate preventive measures, provides for periodic exchange of information between the States concerned on an activity with a risk of transboundary harm.

171. The article appeared to be generally acceptable.

(g) Article 17. National security and industrial secrets [54]

172. The Special Rapporteur explained the need for an article to ensure the legitimate concerns of a State in protecting its national security as well as industrial secrets which may be of considerable economic value. This interest of the State of origin, in the view of the Special Rapporteur, would have to be brought into balance with the interests of the potentially affected State through the principle of "good faith". The Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States [55] attempted to maintain a reasonable balance between the interests of the States involved by requiring the State of origin that is refusing to provide information on the basis of national security and industrial secrets,

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[53] Article 16 reads as follows:

Article 16

Exchange of information

While the activity is being carried out, the parties concerned shall periodically exchange any information on it that is useful for the effective prevention of transboundary harm.

[54] Article 17 reads as follows:

Article 17

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing any information that it is able to provide, depending on the circumstances.

[55] UNEP/GC.6/17.

to cooperate with the potentially affected State in good faith and on the basis of the principle of good-neighbourliness to find a satisfactory solution. The Special Rapporteur attempted to introduce the same balance in article 17 by requiring good-faith cooperation from the State of the origin with the potentially affected State.

173. Some members supported an article of this nature which they found to be a necessary element in regulating the supply of information to other States. To prevent States from using it as a means of evading the legal regime of prevention, it was suggested that the concepts of "national security" and "industrial secrets" should be narrowly defined and that the second part of the article should be strengthened so as to ensure a proper balance between the needs of security and the provision of information pertaining to transboundary hazards. It was also suggested that the words "and in a spirit of good-neighbourliness" be added after the words "in good faith".

174. It was also noted that the exception contained in this article was not without value, but, apart from the fact that it heightened inequality between States, it might defeat the purpose of the obligation to cooperate in good faith. In particular, it might suppress any inclination to exercise the right of initiative that draft article 19 recognized for the State likely to be affected by giving the State of origin a discretionary power not only for the information to be transmitted, but even for the decision whether or not to transmit it.

(h) Article 18. Prior consultation 56/

175. Article 18 would provide for consultations between the States concerned, on preventive measures. It was the view of the Special Rapporteur that

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56/ Article 18 reads as follows:

Article 18

Prior consultation

The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to finding mutually acceptable solutions regarding the preventive measures proposed by the State of origin, cooperation among the States concerned in order to prevent harm, and any other issue of concern in connection with the activity in question, on the understanding that in all cases liability for any transboundary harm it might cause will be subject to the provisions of the corresponding articles of this instrument.

consultations were necessary to complete the process of participation by the affected State and to take into account its views and concerns about an activity with a potential for significant harm to it.

176. Some members found article 18 unbalanced. It seemed to them that the Special Rapporteur had implicitly been working on the basis of a presumption of wrongfulness. Requiring "mutually acceptable solutions" was thus going much too far. This would amount to granting them a right of veto; that would not be acceptable. Stress should therefore be placed on cooperation based on good faith and the spirit of good-neighbourliness. The comment was made that the State of origin naturally had to listen to what the other States had to say, but it alone had to take the final decision, possibly taking account of the "factors involved in a balance of interests" referred to in article 20 of the main draft. Having consulted, informed in good faith, assessed and imposed the necessary preventive measures, including insurance, the State should be able to authorize the activity without the potentially affected States being able to prevent it from doing so, contrary to what draft article 18 implicitly provided. The point was not to find mutually acceptable solutions, but to authorize the conduct of a lawful activity with a "lesser risk".

177. It was also noted that while it was clearly desirable that States should be obliged to consult, it was impossible to require them to reach agreement. A mechanism for settlement of disputes would have to be considered for cases in which no agreement was reached.

178. The remark was also made that one should anticipate a problem in the application of this article, where one State considered that an activity was not likely to cause such harm, while the other insisted on limiting the freedom of the citizens of the first State from engaging in activities beneficial to them. Even if the complainant State was not allowed a right of veto, the obligation to consult would itself entail a duty to satisfy another State and to accept conditions which were perhaps so onerous that the activity itself would have to be abandoned. In such instances, one obvious solution would be to adopt some means for the peaceful settlement of disputes, such as recourse to neutral expert opinions. But even with resort to dispute settlement procedures, the usefulness of this provision was doubtful.

179. As regards the purpose of article 18, it was noted that the Special Rapporteur raised the question of establishing special regimes, perhaps in the form of a convention governing everything relating to the activity in question. In view of that possibility, it was difficult to understand why,

according to article 18, the States concerned should enter into consultations with a view to finding mutually acceptable solutions for any issue of concern in connection with the activity in question, "on the understanding that in all cases liability for any transboundary harm it might cause will be subject to the provisions of the corresponding articles of this instrument". If the articles under consideration were one day to become a framework agreement, it would be quite logical to leave States the possibility of establishing special regimes, including a strict liability regime, to regulate, in detail, the questions dealt with by the framework agreement.

(i) Article 19. Rights of the State presumed to be affected 57/

180. This article is designed to deal with situations where for some reason the potentially affected State was not notified of the conduct of an activity with a risk of potential transboundary harm, as provided for in the above articles. This may have happened because the State of origin did not perceive the hazardous nature of the activity although the other State was aware of it, or because some effects made themselves felt beyond the frontier, or because the affected State had a greater technological capability than the State of origin, allowing it to infer consequences of the activity of which the latter was not aware. In such cases, the potentially affected State may request the State of origin to enter into consultations with it. That request should be accompanied by a technical explanation setting forth the reasons for concern. If the activity is found to be one of those covered by these articles, the State of origin is obligated to pay compensation for the cost of the study.

181. Various comments were made in respect of this article. The comment was made that it would be logical, for States that had not been consulted to be given the right to express their point of view in the spirit of what was

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57/ Article 19 reads as follows:

Article 19

Rights of the State presumed to be affected

Even when no notification has been given of an activity conducted under the jurisdiction or control of a State, any other State which has reason to believe that the activity is causing it or has created a significant risk of causing it substantial harm, may request consultations under the preceding article. The request shall be accompanied by a technical explanation setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State of origin shall pay compensation for the cost of the study.

provided in draft article 19, but subject to two reservations. First, that it was not a right of the State "presumed to be affected", but of the State "likely to be affected". Secondly, the text proposed by the Special Rapporteur should be redrafted in such a way as to distinguish between risk, which, in the context, it was legitimate to take into consideration, and harm, which was not within the scope of prevention. Therefore, there was no need to go any further, in particular as far as the settlement of disputes was concerned. All obligations of prevention linked to "liability" were, in fact, firm obligations which the State had to fulfil, account being taken of the circumstances, existing technology and the means available to it. If it did not fulfil those obligations, it would be responsible, but only within the framework of the topic of State responsibility for internationally wrongful acts.

182. It was also noted that there was the fear that, under the cover of article 19, the State presumed to be affected, would interfere in the economic and industrial policy of the State of origin and thereby cause that State material harm. It would therefore be preferable, in the case of pre-existing activities, to confine the application of measures of prevention to activities having harmful effects or at least to potentially dangerous activities such as nuclear or chemical plants, a list of which could be incorporated in an annex.

(j) Article 20. Factors involved in a balance of interests 58/

58/ Article 20 reads as follows:

Article 20

Factors involved in a balance of interests

In the case of the consultations referred to above and in order to achieve an equitable balance of interests among the States concerned in relation to the activity in question, these States may take into account the following factors:

(a) Degree of probability of transboundary harm and its possible gravity and extent, and the likely incidence of cumulative effects of the activity in the affected States;

(b) The existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

(c) Possibility of carrying out the activity in other places or with other means, or availability of other alternative activities;

183. The Special Rapporteur stated that one of the goals of these articles is to provide for a system or a regime in which the parties could balance their interests. In addition to procedures which allow States to negotiate and arrive at such a balance of interest, there are principles of content to such an exercise. Article 20 intended to deal with the latter and listed factors that must be taken into account in any balancing of interests. He noted the comments made by the members of the Commission at previous sessions. Those comments did not indicate disproval of the list of factors, but uncertainty about where they should be placed. Even though, he himself was, in the past, unenthusiastic about having an article listing factors relevant to balancing of interests, he now finds merit in having such an article. He referred to article 6 of the Law of the non-navigational uses of international watercourses in which factors relevant to the principle of equitable and

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(d) Importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

(e) Economic viability of the activity in relation to possible means of prevention;

(f) Physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm, caused or to undertake alternative activities;

(g) Standards of protection which the affected State applies to the same or comparable activities, and standards applied in regional or international practice;

(h) Benefits which the State of origin or the affected State derive from the activity;

(i) Extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

(j) Willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

(k) Extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

(l) Extent to which assistance from international organizations is available to the State of origin;

(m) Applicability of relevant principles and norms of international law.

reasonable utilization of watercourses were listed. In his view, an article listing factors relevant to balancing of interests was useful because it more easily operationalized a very general concept.

184. Most of the members who commented on this article found it useful particularly if the articles were to become a framework convention whose provisions were meant not to be binding but to act as guidelines for States. It was noted that the article referred both to equitable principles and scientific data, but it was unclear how it would be applied in practice. These members felt the article would be better placed in an annex, particularly in view of the fact that the list was not exhaustive.

185. Several members did not find much utility in the concept of "balance of interest" and consequently in the list of factors contained in the article. The comment was also made to the effect that only the principle of taking account of the interests of other States and of the international community should be included in the article, with a non-exhaustive list of those factors included in the commentary.

(k) Article 20 bis. Non-transference of risk or harm 59/

186. The Special Rapporteur explained that his ninth report dealt with preventive measures, that a State should take in respect of activities with a risk of transboundary harm. These measures, which were basically of a procedural nature, should be accompanied by an article setting forth the principle of non-transference of risk or harm. He mentioned that similar provisions were found in some other legal instruments dealing with comparable problems such as the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (article II(2)), the United Nations Convention on the Law of Sea (article 195) and the Rio Declaration on Environment and Development. Such an

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59/ Article 20 bis reads as follows:

Article 20 bis

Non-transference of risk or harm

In taking measures to prevent, control or reduce the transboundary effects of dangerous activities, States shall ensure that risks or harm are not transferred between areas or environmental media, and that one risk is not substituted for another.

article could be placed in the section on principles and could be drafted more broadly so as to apply to both issues of risk and harm covering the articles on prevention and those on liability which will come later.

187. Few members commented on article 20 bis. Some found it logical and normal to include in the draft articles the principles of non-transference of risk or harm. However, others felt the article only complicated the situation.

3. Other issues

(a) The question of dispute settlement procedures

188. The Special Rapporteur explained that in his view the principle of consultations between the State of origin and the potentially affected State rested on the principle of good faith and cooperation. But he believed that this assumption did not preclude possibilities of impasse where States concerned were unable to resolve by themselves genuine concerns through consultations. In addition, he referred to concerns expressed by some members of the Commission to the effect that the consultations should not provide an opportunity for abuse of the process by the potentially affected State. To remedy these problems the Special Rapporteur found it useful and practical to anticipate a provision on peaceful settlement of disputes to deal specifically with problems which might arise during consultations. One possible means of peaceful settlement of disputes, in the view of the Special Rapporteur, was a commission of inquiry similar to that proposed in appendix IV of the Convention on Environmental Impact Assessment in a Transboundary Context and in annex II of the Convention on the Transboundary Effects of Industrial Accidents. These procedures are designed to provide advice to the parties and are at the same time automatic. The Special Rapporteur did not believe that this was an urgent matter, but he felt that it would be useful if during the discussion, the members of the Commission expressed their views on it.

189. Some members supported the idea of envisaging dispute settlement procedures in the context of this topic. The remark was made that it should be clear whether the articles on the settlement of disputes should apply to disputes in general or only to disputes arising out of the consultations contemplated. It was noted that the Special Rapporteur had presented convincing arguments in favour of specific procedures dealing with dispute relating to the original assessment of risk, more particularly in the form of inquiry commissions. In that context, it was also recommended by some members that any dispute settlement procedure should have a technical inquiry commission as an essential component. The models provided for in the

Convention on Environmental Impact Assessment in a Transboundary Context or in the Convention on the Transboundary Effects of Industrial Accidents were also considered appropriate. Some other members felt that it would be preferable to decide on this question when the work on articles was completed and the a decision on the nature of the articles was made.

(b) The question of the polluter-pays principle

190. The Special Rapporteur noted that in some recent instruments, such as in the Code of Conduct on Accidental Pollution of Transboundary Inland Waters and in the Convention on the Transboundary Effects of Industrial Accidents, there are provisions containing the polluter-pays principle. This principle, in his view, should be carefully examined by the Commission in relation to these articles since the principle was relevant to both measures of prevention and the regime of civil liability. He stated his intentions to examine the polluter-pays principle in his report for the next session of the Commission.

191. Few comments were made on the polluter-pays principle. In general there was agreement that the principle might be appropriate when dealing with the question of liability and that the issue should be discussed thoroughly then. It was noted that a legal regime of the kind the Commission was working on should be based on the liability of the operator rather than on that of the State. The reason was that liability derived from something other than failure to fulfil an obligation and did not entail full compensation for harm, regardless of the circumstances in which the harm had occurred. Transboundary harm resulting from an activity involving risk carried out in the territory or under the control of a State might, however, give rise in certain circumstances to the liability of the State of origin.

192. It was noted that the polluter-pays principle should also be examined in the context of what a State had done before the occurrence of harm and after the occurrence of harm. The role of the State in this regard is relevant to its possible liability for harm caused.

CHAPTER IV

STATE RESPONSIBILITY

A. *Introduction*

193. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic: "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation (*mis en oeuvre*) of international responsibility. 60/

194. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". 61/

195. The Commission, at its thirty-second session, also began the consideration of Part Two of the draft articles, on "the content, forms and degrees of international responsibility".

196. The Commission, from its thirty-second (1980) to its thirty-eighth sessions (1986), received seven reports from the Special Rapporteur, Mr. Willem Riphagen, 62/ with reference to Parts Two and Three of the draft articles. From that time on, the Commission assumed that a Part Three on the settlement of disputes and the implementation (*mise en oeuvre*) of international responsibility would be included in the draft articles. The seventh report contained a section (which was neither introduced nor discussed

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60/ *Yearbook ... 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

61/ *Yearbook ... 1980*, vol. II (Part Two), pp. 26-63, document A/35/10, chap. III.

62/ For the seven reports of the Special Rapporteur, see
Yearbook ... 1980, vol. II (Part One), p. 107, document A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, document A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, document A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, document A/CN.4/366; and Add.1;
Yearbook ... 1984, vol. II (Part One), p. 1, document A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, document A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, document A/CN.4/397; and Add.1.

at the Commission) on preparation of the second reading of Part One of the draft articles, concerning the written comments of the Governments on 10 of the draft articles of Part One.

197. As of the conclusion of its thirty-eighth session in 1986, the Commission had provisionally adopted draft articles 1 to 5 of Part Two. 63/ Draft articles 6 to 16 of Part Two 64/ and draft articles 1 to 5 of Part Three and its Annex had been referred to the Drafting Committee. 65/

198. The Commission, at its thirty-ninth session in 1987, appointed Mr. Gaetano Arangio-Ruiz Special Rapporteur for the topic of State responsibility. 66/ The Commission received from the Special Rapporteur a preliminary report (A/CN.4/416 and Corr.1 (English only) and Corr.2, A/CN.4/416/Add.1 and Corr.1 (English only), Corr.2 and Corr.3 (Spanish only)) in 1988 and a second report (A/CN.4/425 and Corr.1 (English only) and A/CN.4/425/Add.1 and Corr.1 (English only) in 1990. At its forty-first and forty-second sessions in 1989 and 1990, the Commission referred to the Drafting Committee draft articles 6, 7, 8, 9 and 10 of Chapter Two (Legal consequences deriving from an international delict) of Part Two of the draft articles. 67/

199. At its forty-third session, in 1991, the Commission received from the Special Rapporteur a third report (A/CN.4/440 and Add.1) of which it heard the presentation but which it could not consider for lack of time.

63/ The texts of these draft articles are set out in paragraph 334 below.

64/ For the text of draft articles 6 to 16 of Part Two, see Yearbook ... 1985, vol. II (Part Two), p. 20, note 66. These articles were referred to the Drafting Committee at the thirty-seventh session in 1985, see ibid., para. 162.

65/ For the text of draft articles 1 to 5 of Part Three and its Annex, see Yearbook ... 1986, vol. II (Part Two), p. 35, note 86. The five articles of Part Three and its Annex were referred to the Drafting Committee at the thirty-eighth session, in 1986, see ibid., para. 63.

66/ Yearbook ... 1987, vol. II (Part Two), para. 220.

67/ For the text of articles 6 and 7, see Yearbook ... 1989, vol.II (Part Two), paras. 229 and 230. For the text of articles 8, 9 and 10, see Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10), notes 247, 262 and 263.

200. At its forty-fourth session in 1992, the Commission considered jointly the third report of the Special Rapporteur submitted the previous year and his fourth report (A/CN.4/444 and Add.1-3). It referred to the Drafting Committee draft articles 11, 12, 13 and 14, as well as a draft article 5 *bis*, of Part Two of the draft articles.

201. Also at the forty-fourth session, the Drafting Committee adopted on first reading a new paragraph 2 to be included in article 1, as well as articles 6 (Cessation of wrongful conduct), 6 *bis* (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction) and 10 *bis* (Assurances and guarantees of non-repetition) of Part Two of the draft articles. However, in keeping with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the recommended draft articles to its subsequent session and merely took note of the report of the Drafting Committee (A/CN.4/L.472). Also at the forty-fourth session, the Commission referred to the Drafting Committee draft articles 11 to 14 and 5 *bis* proposed by the Special Rapporteur in his fourth report (A/CN.4/444 and Add.1-3) for inclusion in Part Two of the draft articles.

B. Consideration of the topic at the present session

1. The draft articles adopted by the Drafting Committee at the forty-fourth session of the Commission

202. At its 2314th and 2316th meetings, the Commission considered and provisionally adopted a new paragraph 2 to be included in article 1 of Part Two of the draft articles as well as articles 6 (Cessation of wrongful conduct), 6 *bis* (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction) and 10 *bis* (Guarantees of non-repetition), also for inclusion in Part Two of the draft articles. The text of those provisions and the commentaries thereto are reproduced in Section C 2. below.

2. The draft articles contained in the fourth report of the Special Rapporteur submitted at the forty-fourth session of the Commission

203. As already noted in paragraph 201 above, the Commission at its forty-fourth session, had referred to the Drafting Committee the draft articles proposed by the Special Rapporteur in his fourth report (A/CN.4/444 and Add. 1-3), namely draft articles 11 (Countermeasures by an injured State), 12 (Conditions of resort to countermeasures), 13 (Proportionality), 14 (Prohibited countermeasures) and a draft article 5 *bis*.

204. At the present session, the Drafting Committee devoted 26 meetings to the above-mentioned articles. Its report (A/CN.4/L.480 and Corr.1 (French only) and Add.1) was introduced by the Chairman of the Committee at the 2318th meeting of the Commission. It contained the text of the articles adopted by the Committee on first reading for inclusion in Chapter II (Instrumental "consequences of internationally wrongful acts") of Part Two of the draft articles, namely articles 11 (Countermeasures by an injured State), 12 (Conditions relating to resort to countermeasures), 13 (Proportionality) and 14 (Prohibited countermeasures). However, in line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time, it will have before it the material required to enable it to take a decision on the proposed draft articles. At the present stage, the Commission merely took note of the report of the Drafting Committee.

3. The fifth report of the Special Rapporteur

205. At the present session the Commission had before it the fifth report of the Special Rapporteur which consisted of two chapters. Chapter I (A/CN.4/453 and Add.1 and Add.1/Corr.1, 2 and 3) was entitled "Part Three of the draft articles on State responsibility and dispute settlement procedures" and contained 6 draft articles accompanied by an Annex. That chapter was introduced by the Special Rapporteur at the 2305th meeting and was considered by the Commission at its 2305th to 2310th and 2314th meetings. At its 2314th meeting, the Commission referred the draft articles and the Annex contained in Chapter II of the fifth report to the Drafting Committee for consideration in the light of the comments and observations made in the course of the debate. The relevant views are reflected in subsection (a) below. Chapter II of the fifth report (A/CN.4/453/Add. 2 and 3) was entitled "The consequences of the so-called international 'crimes' of States (article 19 of Part one of the draft)". Subsection (b) below contains a summary of the introductory statement made by the Special Rapporteur at the 2315th meeting of the Commission. Chapter II was not discussed for lack of time.

(a) The question of dispute settlement procedures

206. In introducing Chapter I of his fifth report, the Special Rapporteur recalled that in 1985-1986, the Commission had considered, and subsequently referred to the Drafting Committee, dispute settlement provisions proposed by Mr. Riphagen, the previous Special Rapporteur, as an integral part of the draft, namely Part Three as envisaged since 1963. While recognizing the

general support for those proposals in the Commission's 1985 and 1986 debates, the present Special Rapporteur believed that more effective dispute settlement provisions should be included in the said Part Three as an integral part of the draft articles and of the future convention. This in order to remedy the drawbacks of unilateral countermeasures which were persuasively identified in the Sixth Committee debate of 1992.

207. The Special Rapporteur noted that the reference to settlement procedures in article 12, which was pending since last year before the Drafting Committee as part of the rules setting forth the conditions of countermeasures, covered only those procedures which might be available to the parties, namely, a given injured State and a given wrongdoing State, at the time the injured State wanted cessation and reparation and was considering whether to resort to countermeasures in order to obtain them. The main point about article 12, paragraph (1) (a), 68/ in particular, was that it mentioned, in addition to the vague and usually less than effective general settlement obligations deriving from Article 33 of the Charter or similar provisions, such more effective obligations as might exist in each concrete case for the parties in the responsibility relationship. In addition to Article 33, the reference was obviously to general treaties, compromissory clauses and other international instruments envisaging conciliation, arbitration and/or judicial settlement, such procedures to be resorted to either by ad hoc agreement or by unilateral application. He stressed that, whenever such procedures were thus "available", they should be used by the injured State before it resorted to countermeasures, as a precondition to the latter's lawfulness.

Article 12 (1) (a) only referred to such procedures and to the international texts under which they might be available to any injured State.

Article 12 (1) (a) in other words did not directly create the injured State's

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68/ Reading as follows:

> "1. Subject to the provisions set forth in paragraphs 2 and 3, no measure of the kind indicated in the preceding article shall be taken by an injured State prior to:
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> (a) the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which it is a party; and
>
> ..."

obligation to resort to given measures. It only provided that any such procedures, if available, should be used prior to resorting to countermeasures.

208. The Special Rapporteur pointed out that the problem he proposed to resolve in Part Three was a different one. It concerned, precisely, the settlement obligations to be set forth anew by way of, as it were, a "general compromissory clause" of the draft articles themselves. Such settlement obligations would be created by Part Three of the draft articles and eventually Part Three of a future convention on State responsibility.

209. In this regard, the Special Rapporteur outlined the two possible approaches to the general provisions on dispute settlement for Part Three.

210. One would be a maximalist approach which would directly set forth the obligation to exhaust given, directly prescribed third party settlement procedures (normally arbitration or judicial settlement), such procedures to be implemented before any resort to unilateral reaction. Countermeasures would be admissible, if such a "theoretically ideal" solution was adopted, only in order to coerce a recalcitrant wrongdoing State to comply with a binding arbitral award or judgement.

211. Considering, however, the unlikelihood that such an "ideal" solution prove to be acceptable, the Special Rapporteur would not propose any draft articles embodying it unless the debate revealed that it met with his colleagues' favour.

212. A more realistic approach would be, according to the Special Rapporteur, to adopt in Part Three a solution that would not affect directly the injured State's prerogative to resort to countermeasures (under the conditions and limitations set forth in articles 11-14 of Part Two, article 12 included) but at the same time reduce the risk of arbitrariness of the injured State's reaction by subjecting such reaction to ex post facto third party verification. This was precisely the solution that he proposed in his report.

213. According to that solution (as embodied in proposed draft articles 1-6 and the Annex thereto), if a dispute arose between the parties following adoption of a countermeasure by the allegedly injured State and a protest or other form of reaction by the allegedly wrongdoing State, and if such a dispute was not disposed of, either party would be entitled to initiate unilaterally a conciliation procedure. Failing settlement by such procedure within a given period, either party would be entitled to initiate unilaterally an arbitral procedure. A third step, before the ICJ, was proposed in case of

excès de pouvoir by the arbitral tribunal and in other hypotheses. The Special Rapporteur pointed out that although in principle three steps were provided for, it would presumably not be frequent that they be all used in every case. The dispute could well be settled during and following the conciliation procedure, namely in one step. Arbitration would come into play only in case of failure of conciliation; and the procedure before the ICJ, in its turn, would only come into play in case the arbitral proceedings failed or the arbitral award was contested for excès de pouvoir or violation of fundamental rules of arbitral procedure.

214. The Special Rapporteur drew attention to three essential features of the proposed three-step third-party dispute settlement system (conciliation, arbitration and judicial settlement). First, failing an agreed settlement between the parties at the described post-countermeasure stage, the system would - without significantly hampering the parties' procedural choices - lead to a binding settlement. Second, the settlement procedures would not directly curtail, in any significant measure, the injured State's prerogative to take countermeasures at its own risk and subject to the basic requirements and conditions for lawful countermeasures. The proposed procedures would be activated after the injured State had made and acted on its unilateral determinations and would help to settle the ensuing dispute in a timely and effective fashion. Particularly, the availability of the third-party dispute settlement system would have a sobering effect on an injured State's decision to resort to countermeasures. The countermeasure could be suspended by an order of a third-party body after the initiation of a settlement procedure.

215. The Special Rapporteur emphasized that the proposed dispute settlement system would come into play only after (1) a countermeasure had been resorted to by an injured State, allegedly in conformity with draft articles 11 to 14 of Part Two, and (2) a dispute had arisen with regard to its justification and lawfulness. Thus, the "triggering mechanism" of the settlement obligations in Part Three would be neither the alleged breach of a primary or secondary rule nor the dispute that might arise from the contested allegation of such a breach, but rather a dispute arising from contested resort to a countermeasure by an allegedly injured State or, possibly, resort to a counter-countermeasure

by the allegedly wrongdoing State. He suggested that the proposed solution, while respectful of customary practices, would in fact be effective in curbing abuses of countermeasures.

216. The Special Rapporteur also emphasized, however, that, although the triggering mechanism for the three-step procedure would be the dispute arising from the taking of a countermeasure by the allegedly injured State and the target State's reaction thereto, the proposed procedures would cover not just the lawfulness of the countermeasures under articles 11-14 of Part Two but any factual or legal issues relating to any aspect of the responsibility relationship coming in dispute between the parties. Indeed, the conditions of lawfulness of a countermeasure included not just proportionality (article 13), prior resort to amicable settlement procedures (article 12) or compliance with the prohibition of force (article 14), etc. They also included the existence of a wrongful act, attribution to the target State, absence of circumstances excluding wrongfulness and non compliance by the wrongdoer with its obligation to provide reparation. Thus, the conciliation, arbitration or judicial settlement procedures envisaged for Part Three would deal not only with any issue covered by draft articles 11 to 14 of Part Two as proposed last year, but also with any other issue of fact or law concerning the interpretation or application of any of the articles of the future State responsibility convention, Part One and the "substantive" portion of Part Two included. This was expressly stated with regard to conciliation and arbitration in draft article 2 (1) (a) and draft article 4 (1) of Part Three, respectively. 69/

217. The Special Rapporteur encouraged the Commission to abandon its cautious policies regarding dispute settlement provisions and to adopt a suitably effective settlement system in the State responsibility draft. This for two capital reasons.

218. Firstly, only an adequately effective dispute settlement system would significantly correct the serious drawbacks of the existing regime of unilateral reactions. Much as one might try to reduce the arbitrariness inherent in such a regime by adopting severe rules on countermeasures (such as those proposed in draft articles 11-14 of Part Two), there remained the snag represented by the fact that the interpretation/application of the adopted rules would still remain, in principle, in the hands of the single injured

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69/ See note 68 above.

States. Only by third party verification procedures to be embodied in Part Three could the danger of abuse of such unilateral choices be reduced for the sake of justice and equality among States.

219. Secondly, by grafting an adequate settlement machinery into the State responsibility project, the Commission would not miss a most important occasion to make a signal contribution to the reduction of the increasingly striking gap characterizing the inter-State system in the area that should be covered by the judicial function.

220. The Special Rapporteur finally urged the Commission not to assume that Governments were not prepared to accept more advanced dispute settlement commitments or to make use of dispute settlement procedures, particularly in the light of the recent trends in this area. In his view, the Commission should propose provisions which it considered to be the minimal requirements and let Governments take the responsibility for accepting or rejecting its proposals.

(1) General observations

221. Many members took the view that the future convention on State responsibility should contain provisions on the settlement of disputes arising out of its interpretation and application. Some however expressed reservations or struck a note of caution in this respect.

(i) The question whether the future convention should be accompanied by a dispute settlement regime providing for compulsory third-party settlement procedures

222. Three main arguments were presented and discussed in this connection. The first concerned the evolution of the international climate and the attitudes of States. It was pointed out in particular that Eastern European countries were taking a new approach to the question of dispute settlement following the end of the cold war and that States displayed increased willingness to accept not only compulsory dispute settlement procedures such as those provided for in the 1969 and 1986 Conventions on the Law of Treaties, but also, as shown by the increasingly heavier case load of the International Court of Justice, judicial procedures. Attention was also drawn to the beneficial influence of the 1982 Manila Declaration on the Peaceful Settlement of International Disputes in promoting recognition of the need for effective

States. Only by third party verification procedures to be embodied in Part Three could the danger of abuse of such unilateral choices be reduced for the sake of justice and equality among States.

219. Secondly, by grafting an adequate settlement machinery into the State responsibility project, the Commission would not miss a most important occasion to make a signal contribution to the reduction of the increasingly striking gap characterizing the inter-State system in the area that should be covered by the judicial function.

220. The Special Rapporteur finally urged the Commission not to assume that Governments were not prepared to accept more advanced dispute settlement commitments or to make use of dispute settlement procedures, particularly in the light of the recent trends in this area. In his view, the Commission should propose provisions which it considered to be the minimal requirements and let Governments take the responsibility for accepting or rejecting its proposals.

(1) General observations

221. Many members took the view that the future convention on State responsibility should contain provisions on the settlement of disputes arising out of its interpretation and application. Some however expressed reservations or struck a note of caution in this respect.

(i) The question whether the future convention should be accompanied by a dispute settlement regime providing for compulsory third-party settlement procedures

222. Three main arguments were presented and discussed in this connection. The first concerned the evolution of the international climate and the attitudes of States. It was pointed out in particular that Eastern European countries were taking a new approach to the question of dispute settlement following the end of the cold war and that States displayed increased willingness to accept not only compulsory dispute settlement procedures such as those provided for in the 1969 and 1986 Conventions on the Law of Treaties, but also, as shown by the increasingly heavier case load of the International Court of Justice, judicial procedures. Attention was also drawn to the beneficial influence of the 1982 Manila Declaration on the Peaceful Settlement of International Disputes in promoting recognition of the need for effective

was observed, the Commission must be careful not to adopt too revolutionary an approach and must display the necessary realism by not proposing provisions that States would not accept.

226. While recognizing that the Commission should not produce drafts doomed to certain rejection by States, some members observed that there was nothing in the debates of the Sixth Committee from which it might be concluded that such a tragic fate awaited the present draft. In this connection, the remark was made that the final acceptance of a treaty in terms of ratification and accession sometimes depended, at least in part, on whether there was what could be described as a "marketing agency" to promote that treaty: for example, the wide adherence to conventions relating to humanitarian law could largely be ascribed, notwithstanding the inherent merits of those conventions, to the efforts of the International Committee of the Red Cross and treaties such as the recent Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction were gaining acceptance because an influential State or States had the interest and the means to persuade other States to accept them. The Commission was furthermore reminded that draft articles based on what it assumed States wanted had sometimes been set aside by the General Assembly, even when the majority of the States represented in the Assembly had not expressed any reservations on them.

227. Other members urged the Commission to distinguish between what was desirable and what was possible. They observed that if the Commission had not contributed very significantly to the law of dispute settlement, it was not for lack of either concern or skill on the part of its members but because it had been guided first and foremost by the desire not to risk rejection of a given draft as a whole by including therein settlement provisions unacceptable to States. Unfortunately, it was stated, the same problem still arose and the position of States did not seem to have changed sufficiently to warrant optimism about the likelihood of an elaborate system being widely accepted. In the opinion of those members, the issue should be solved not in the framework of an innovative system that broke with existing international law but through a flexible mechanism within which binding procedures would play only a limited role. A modest approach was viewed as all the more advisable as the topic of State responsibility covered the whole spectrum of

international law; as a result, any settlement regime in this area would affect both the primary and secondary obligations on issues of fundamental importance to States.

228. A third argument which was presented by many members in favour of the inclusion of compulsory third-party procedures related to the need to protect weak States from abuses, on the part of powerful States, of the right to resort to unilateral measures. It was recalled in this connection that the inclusion in the draft of a regime on countermeasures had been deplored by many members, especially if it could be used to take advantage of the inequality of States, but had at the same time been judged necessary in order to make the text acceptable to the entire international community and to prevent automatic use of countermeasures when a breach of an obligation was alleged to have taken place. The fact remained, it was stated, that countermeasures were an exercise in power, wielded more often than not to the detriment of the principles of equality and justice and that by sanctioning unilateral resort to countermeasures, the Commission was opening the door to many possible abuses and would also consecrate a rule capable of widely differing interpretations. As a result, in the view of many members, it was imperative that the draft articles should not only provide for substantive rules such as rules prohibiting countermeasures in certain areas or the rule on proportionality, however deceptive it was, but also establish effective (i.e. prompt and binding) procedures for compulsory third-party dispute settlement, particularly, one member added, in view of the radical change that had taken place since the end of the cold war period and of the consequential disappearance of the checks and balances of that period. Attention was also drawn to the risk of escalation inherent in the very idea of countermeasures and to the need to find a solution to the dispute as rapidly as possible in order to prevent a succession of countermeasures and counter-countermeasures. It was also stressed that countermeasures were contrary to the principle that no one was entitled to take justice into his own hands and thus kept the implementation of international law at a primitive stage which had long disappeared from organized systems of internal law.

229. Other members, while recognizing that there must be a strong check on disproportionate and excessive countermeasures, took the view that compulsory dispute settlement procedures were not a viable means to that end because States were unlikely to have resort to this kind of procedure in areas where countermeasures most needed to be checked. Mention was made in this

connection of issues such as the legality of armed attack and self-defence, assistance to insurgents and counterinsurgents, economic embargo or suspension of treaties. The remark was made that current practice did not warrant the conclusion that States were prepared to submit issues of the type indicated above to compulsory third-party settlements. Thus, it was stated, the question called for legislation rather than judicial action and the Commission should focus its attention on the clarification and, indeed, the development of the substantive rules governing countermeasures and define the norms and principles governing international delinquencies and the corrective countermeasures, instead of relegating that task to a compulsory third-party settlement regime involving lengthy and complicated procedures. Along the same lines, the remark was made that envisaging a more binding special regime for the settlement of disputes relating to countermeasures could not relieve the Commission from the obligation of specifying the rules applicable to countermeasures, inasmuch as arbitrators and judges, unlike legislators, were bound by positive law and would, in the absence thereof, be unable to restrict the use of countermeasures, even in the framework of an advanced dispute settlement regime.

(ii) Scope of the dispute settlement regime to be envisaged

230. The remark was made that this issue was a very complex one because dispute settlement in the context of State responsibility would be dispute settlement right across the board. In this context, the question was raised whether the Commission should design a dispute settlement system to deal with any question that arose about the interpretation or application of the entire set of draft articles on State responsibility. This question was generally answered in the affirmative, with some members stressing that the area of countermeasures should receive special and priority attention because a countermeasure was an exceptional derogation from international law. Doubts were at the same time expressed on the possibility of devising a single regime for all types of disputes which could arise in the context of State responsibility, bearing in mind that, in international life, there was a wide variety of situations that should all be dealt with on the basis of their characteristics. In this connection, reference was made to the case of the Geneva Conventions of 1949 and the Additional Protocols of 1977.

231. Various ways of delimiting the scope of the dispute settlement regime to be provided for in the future convention were mentioned. One approach consisted in restricting this regime to disputes concerning the interpretation

or application of the future instrument on the basis of the usual model of treaty provisions on dispute settlement which applied only to disputes in connection with the treaty in question. Doubts were expressed on the viability or desirability of such a solution. It was asked whether it was possible or advisable to distinguish between the general question of State responsibility and the problem of the primary rules which were involved and whose violation gave rise to such responsibility, since many questions covered by the draft articles were closely linked to the primary rules. Reference was made in this connection to the difference between obligations of result and obligations of means and to the case of international crimes, in which the so-called secondary rules crossed the artificial border between primary and secondary rules and in which an analysis of the substantive rule violated by the allegedly wrongdoing State at the expense of the allegedly injured State was necessary. It was thus concluded that a settlement regime limited to disputes relating to the interpretation or application of the future convention would not make much sense. Along the same lines, the remark was made that, although there was some force in the argument that by providing for a compulsory settlement procedure, the Commission ran the risk of moving from the general part of the draft to the realm of primary rules, the inclusion in the draft of a set of procedural rules on dispute settlement would not be ultra vires inasmuch as the division into primary and secondary obligations was no more than a logical tool designed to make sure that the draft was coherent. Adopting such a course would not, it was stated, involve questions of treaty interpretation any more than, say, article 5, paragraph (2) (f), of Part Two, already adopted by the Commission at an earlier session and the division of rules into primary and secondary rules should be approached with measured flexibility, allowance being made, in particular, for obligations existing in what might be described as the "twilight zone".

232. Another approach to the question of the scope of the dispute settlement regime was to make any violation of an international obligation, whatever its purpose, subject to a compulsory regime in accordance with the philosophy embodied in article 1 of Part One. This approach was viewed as representing a considerable leap forward in the development of international law. It was noted that, until now, States had always defended their right to choose the settlement procedure that best suited their needs, in accordance with the

principle embodied in Article 33 of the Charter of the United Nations, emphasized in the Manila Declaration and regarded as one of the cornerstones of the international legal system.

233. In view of the above, several members questioned the wisdom of envisaging a rigid settlement procedure for any international dispute, whatever its nature, its significance for the country concerned and its long-term repercussions. It was suggested that there should be separate regimes for the evaluation of the lawfulness of countermeasures and the settlement of disputes relating to the interpretation or application of the future convention. This approach was viewed as having a two-fold advantage: it would allow an impartial decision to be taken rapidly on the admissibility of countermeasures, something which would be both in the interest of the wrongdoing State, which might be affected by unjustified countermeasures, and in the interest of the injured State, which would thus be assured of not subsequently being penalized for having acted *ultra vires*; and recourse to settlement procedures in the event of a dispute relating to the application or interpretation of the future convention would be available even in the absence of countermeasures. Another proposal was to distinguish between disputes concerning the lawfulness of countermeasures, disputes related to crimes and other disputes.

234. The members favouring a differential treatment for various categories of disputes correlatively advocated more or less mandatory procedures for each of those categories. As regards disputes concerning the lawfulness of countermeasures, it was suggested that a "countermeasures commission" should be established along the lines of an arbitral tribunal, but constituted and operating according to simplified rules, with the task of determining the lawfulness of countermeasures, trying, if necessary, to get the parties to agree to a compromise solution before handing down a binding decision and, ultimately, acting as an arbitration, mediation and investigatory body. An argument in favour of that solution was that the situation prior to the adoption of countermeasures, the legal obligations then in force, the reality of the alleged violation and, in the event that a violation had been committed, the need for the countermeasure and its proportionality were all questions of fact for which it would be difficult for negotiation, mediation and conciliation to provide a solution. Another suggestion was to give the competent organ, whether an arbitral tribunal or a conciliation commission,

the power - subject, however, to the approval of States expressed through a declaration or ratification of a separate protocol - to order provisional measures of protection for the parties to the dispute.

235. For disputes concerning international crimes, it was suggested to envisage a three-tier regime including conciliation, arbitration and resort to the ICJ, which would be embodied in an optional protocol to the future convention.

236. As regards other disputes, the view was expressed that the most one could realistically hope for was compulsory conciliation as provided for under article 66 of the Vienna Convention on the Law of Treaties - an outcome which, it was stated, would not be bad at all, since it concerned international responsibility, namely, the fundamental mechanism regulating the whole of international law.

237. According to another approach suggested in the Commission, the procedure and its conclusions would be made compulsory, but a distinction would be drawn between the following steps: conciliation would be compulsory for any dispute relating to any provision of the future instrument; however, its conclusions would not be compulsory, except in the case of provisional measures of protection, whether directed at the wrongdoing State or at the injured State; arbitration would be an option open to all States, but it would be compulsory whenever, in view of the nature of the points of fact or of law at stake, the parties would not be able to regard their sovereignty or their freedom of choice as being called into question; with regard to judicial settlement, the possibility might be considered of giving the International Court of Justice compulsory jurisdiction when what was at issue was a peremptory norm of general law or other specific provisions of the future convention and conferring optional jurisdiction on it in the case of disputes relating to other matters.

(iii) Other aspects

238. Some members stressed that the question of costs was of decisive importance for the great majority of States, namely the poorer ones. Reference was made in this connection to the problems faced by Mali and Burkina Faso during the settlement of their border disputes: the two parties had requested the International Court of Justice to appoint three experts to help in mapping out the border between them following the Court's ruling in 1986 but subsequently, both countries, though accepting the substance of the ruling, had admitted to being unable to meet the expenditure occasioned by the

mapping work; a benefactor had finally been found in the Swiss Government. This example was viewed as clearly demonstrating the urgent need to give adequate and effective legal aid to developing countries. Mention was also made in this context of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes, which could be used to finance the drafting of legal documents, the payment of fees, the funding of legal research and many other aspects of legal procedure, but only - and this was a major restriction - in connection with a case brought before the International Court of Justice by common agreement between the parties - which meant that its use was barred in cases of arbitration or conciliation and that a wealthy State had only to reject a preliminary agreement in order to prevent a poorer State from preparing its case in the best possible manner. That aspect of the Fund's operations was viewed as calling for revision.

239. Some members commented on the formal aspects of the elaboration of the dispute settlement regime to be envisaged in the present context, i.e. its degree of integration into the future convention; the most appropriate forum for its formulation; and the time-frame for its completion.

240. On the first point, many members felt that the dispute settlement regime should be an integral part of the draft as was envisaged in the plan adopted by the Commission in 1975. 70/ Some members however felt that the dispute settlement mechanism, or parts thereof, should be included in an optional protocol or incorporate an "opt in, opt out" clause.

241. As regards the forum in which the dispute settlement mechanism should be worked out, many members felt that, if the Commission was not to fail in its task, it should not leave that point to be decided by the future diplomatic conference. Other members however felt that at the present stage of development of the law in this area, it would be wiser to provide guidelines, and leave the task of devising appropriate mechanisms to the plenipotentiary conference.

242. As for the time-frame within which provisions on dispute settlement should be elaborated, some members observed that the dispute settlement system was closely bound up with countermeasures and that the substantive rules and the procedural rules in that area formed an organic whole, the elements of

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70/ See note 60 above.

which had to be considered jointly or in parallel. Other members found it questionable to engage in detailed work on Part Three until the first reading of Parts One and Two had been completed.

243. One outstanding issue which, it was stated, ought to be solved before tackling Part Three was that of State crimes as described in article 19 of Part One. According to one view, a serious re-examination of that article should precede the elaboration of a dispute settlement regime. Concern was on the other hand expressed that attempts might be made to dismiss, rewrite and water down article 19 which, it was recalled, had already been adopted on first reading and enjoyed the overwhelming support of the Sixth Committee.

(2) The dispute settlement system proposed by the Special Rapporteur

244. Chapter I of the fifth report of the Special Rapporteur was generally noted with appreciation. It was described as an orderly and thought-provoking document reflecting great learning and vision, and as a significant contribution to the progressive development of international law.

245. As for the Special Rapporteur's proposals, [71] they were favourably commented upon by many members but gave rise to reservations on the part of others.

(i) The scope of the proposed system

246. It was recalled that the Special Rapporteur, like his predecessor, Mr. Riphagen, had displayed the intention of respecting the approach adopted by the Commission in which a first part, on the definition of an internationally wrongful act as a source of State responsibility, and a second part, on the legal consequences of an internationally wrongful act, would be followed by specific provisions on implementation and on the settlement of disputes arising out of the application and interpretation of the rules contained in the first and second parts.

247. Some members took the view that the fifth report was not fully in keeping with the initial intention and the desire of most members of the Commission, inasmuch as it focused almost exclusively on arguing the need for procedures for settlement of disputes in respect of countermeasures and proposed a set of articles dealing exclusively with disputes consequential upon the adoption by the allegedly injured State of any countermeasures against the allegedly law-breaking State and not settled by one of the means referred to in

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[71] For the text of the draft articles and the Annex proposed by the Special Rapporteur see notes 74, 75, 76, 77, 78 and 79 below.

article 12, paragraph 1 (a). 72/ While noting that, in the Special Rapporteur's intention, the envisaged procedures would cover not just the interpretation/application of the articles on countermeasures but the interpretation/application of any provision of the future Convention, several members felt that the fifth report was ambiguous in this respect. Attention was in particular drawn to what was described as inconsistencies between specific paragraphs of the report and draft article 1, which expressly provided that the proposed system could be set in motion only "If a dispute ... has arisen following the adoption by the ... State of any countermeasures against the ... law-breaking State", from which it followed that, in the absence of countermeasures, the provisions relating to the settlement of disputes could not be invoked even if there was a dispute relating to the application or interpretation of the future instrument.

248. While recognizing that the report and the draft articles were somewhat ambiguous in that the Special Rapporteur's analysis was based at the same time, and alternatively, on disputes relating to the entire set of articles of the future instrument and on those relating specifically to countermeasures, other members observed that specific paragraphs of the report indicated that the Special Rapporteur was considering the issue in its entirety and that, even though draft article 1 appeared restrictive, draft article 2, paragraph 1 (a) confirmed that the dispute settlement system covered all questions which might arise from the interpretation and application of the future instrument.

249. Several members felt that resort to countermeasure had rightly been given by the Special Rapporteur a prominent place and a triggering role in the setting in motion of the proposed dispute settlement system. They agreed with him that the substantive rules and procedural rules in the area of countermeasures formed an organic whole and that without an adequate and somewhat stringent dispute settlement system, the use of countermeasures would result in parties taking the law into their own hands - the very negation of the rules of law - and in elemental power struggles. Thus, it was stated, a regime of countermeasures and a dispute system constituted in every sense a package deal, the latter being a *sine qua non* of the former. Disputes other than those relating to countermeasures, on the other hand, were viewed as calling for a different treatment because disputes arising from the violation

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72/ See note 68 above.

of a substantive rule could be resolved either under the means provided for by the instrument from which the rule derived, or under Article 33 of the Charter or under a special agreement between the parties.

250. Other members questioned whether, by placing the emphasis on the compulsory settlement regime as a counterweight to possible countermeasures, the Special Rapporteur had really been acting in accordance with the logic of the draft articles, Part Three of which was supposed to apply to the draft as a whole. They recognized that a limited approach could be justified in view of the number of general dispute settlement treaties which were not being implemented and were ineffective and that the Special Rapporteur might legitimately have preferred to rely on practice for disputes other than those following on the adoption of countermeasures; at the same time however, they stressed that, despite the sources of dissension that continued to exist, developments in the international situation offered fertile ground for the progressive development of the law relating to the settlement of disputes in general. In that context, it was stressed that some general instruments, such as the Pact of Bogota and the OAU Charter and its Protocol, had played a very useful role in the settlement of disputes. Some members also said that it was open to discussion whether the victim State of an internationally wrongful act should be given an opportunity to use the proposed procedures only if it had taken countermeasures. Such an approach was viewed as not entirely rational and as giving the impression that countermeasures were the source of the dispute, whereas they were in fact the result of the original wrongful act.

(ii) The general economy of the proposed system

251. Several members remarked that the fifth report proposed two alternatives, one of which was regarded by the Special Rapporteur as theoretically more satisfactory, while the other was considered more realistic. The first alternative - the "ideal" solution - consisted in introducing in the draft articles a more or less organic system of third-party settlement procedures, which would ultimately lead, failing agreement, to a binding third-party pronouncement and, at the same time, making the lawfulness of any resort to countermeasures conditional, subject to limited exceptions, upon the existence of the said binding third-party pronouncement. The second alternative was described as follows: any State which intended to adopt a countermeasure first had to warn the State concerned of its intention, requesting that some settlement procedure should be resorted to without delay. If the dispute was not settled and a countermeasure was taken, a compulsory third-party

settlement procedure should be implemented as a last resort, in the event the negotiation or the conciliation failed, so that a decision might be taken on the lawfulness of the countermeasure.

252. Some members expressed a preference for the first alternative. In their view, it should be possible to fit in a compulsory third-party settlement procedure before the adoption of any countermeasure with a view to defeating any recalcitrant attitude on the part of the wrongdoing State and setting in motion the necessary provisional measures of protection until it had been decided whether there had really been a wrongful act and, if so, what reparation should be provided. However long the institution of such a procedure might take, such delays would be far less prejudicial for the law than a violation of the law by way of reaction or, in other words, than a countermeasure. It was also emphasized that not instituting a dispute settlement procedure prior to the adoption of countermeasures would long keep alive the vestiges of the time when the idea of taking justice into one's own hands was the predominant doctrine and practice - which the inter-State system had decided to reject in other areas. The institution of a compulsory third-party dispute settlement procedure was regarded as all the more necessary in that the States in dispute would not necessarily be on a footing of equality and that, to guarantee "equality before the law", voluntary negotiation, mediation or conciliation procedures could not be relied on, for their conclusions were only recommendatory.

253. The prevailing view was, however, that a system which would have the effect of subjecting the whole of the law of responsibility and, indirectly, the evaluation of compliance with all the substantive rules to an international arbitral or judicial body was out of keeping with the stage of development of modern international society which consisted of sovereign States and in which the principle of freedom of choice laid down in Article 33 of the Charter of the United Nations was the cornerstone of the law on dispute settlement. The second alternative proposed by the Special Rapporteur, namely, subjecting a State which took the law into its own hands and resorted to unilateral measures to increasingly restrictive legal controls, was therefore recognized by many members, sometimes reluctantly, as the one to be preferred.

254. Some members took the view that even the second alternative under which the States that ratified the future convention would be bound to resort to a Conciliation Commission with a number of decision-making powers, then to compulsory arbitration and then to the International Court of Justice would create a great upheaval in the international legal order, the more so as, since all legal disputes involved questions of responsibility, all would become justiciable. The hierarchical three-step settlement regime proposed by the Special Rapporteur was viewed as novel to the point of going beyond the progressive development of international law and as ignoring the fact that, in actual life, most disputes between States were not referred for judicial settlement.

255. Other members felt that the dispute settlement regime advocated by the Special Rapporteur was not as bold or revolutionary as had been claimed and that by adopting it, the Commission would not be breaking new ground but merely following current trends. It was pointed out that, at a time when a new international order appeared to be taking shape against a background of the right of interference, the settlement of disputes continued to take place on the basis of the sovereignty of States, of which countermeasures were precisely the secular arm, and that the practice of interference - or, in other words, less sovereignty and more solidarity - was international law in the making, not de lege ferenda. It was thus asked why written rules limiting the sovereignty of States in their propensity to manipulate international legality should be de lege ferenda and the Commission, whose duty was to make war on war by means of the law, was encouraged to make States face up to their responsibilities. The Special Rapporteur's proposals were viewed as in line both with current trends in bilateral and multilateral treaties (including the 1969 and 1986 Conventions on the Law of Treaties and the 1982 Convention on the Law of the Sea) and with the recommendation made by members of the Sixth Committee that dispute settlement procedures should be expanded to include innovative approaches. The remark was further made that, notwithstanding the complexity of the issue, it was no wild flight of fancy to think that States should be required to agree to third-party settlement in matters pertaining to their behaviour with regard to a treaty.

256. In the Special Rapporteur's view, the criticism referred to in paragraph 60 above was justified in terms of the "ideal" solution, but not in terms of the less ambitious solution, which made the lawfulness of countermeasures subject not to the procedures of the future Part Three, but to the procedures listed in Article 33 of the Charter or provided for in instruments binding the parties independently of the future convention. He noted that, in any event, including within the framework of a regime consisting of procedures differing according to the type of dispute, the freedom of choice of the parties during the phase prior to countermeasures would remain intact and that the procedures directly provided for by the Convention could be implemented only after countermeasures had been taken.

257. Some members commented on the relationship between the proposed dispute settlement system proposed for Part Three and article 12 1 (a), 73/ as formulated by the Special Rapporteur in his fourth report. Some felt that, on this particular point, the Special Rapporteur's position had shifted between his fourth and fifth reports. They observed that, as presented in the fourth report, article 12 1 (a) made the lawful resort to countermeasures conditional upon the exhaustion of a whole range of procedures provided for in instruments other than the future convention, whereas the procedures in Part Three were only to be set in motion following the adoption of countermeasures. Concern was expressed that the logic of this approach was being put in question by the Special Rapporteur's current interpretation of article 12 1 (a), whereby that provision only referred to settlement means without directly prescribing them. As a result of this interpretation, it was stated, there was no longer any question of calling on the injured State to refrain from adopting countermeasures before the exhaustion of the existing dispute settlement procedures or even the procedures provided for in the future convention itself.

(iii) Specific suggestions and comments on draft articles 1 to 6 and the Annex proposed by the Special Rapporteur

258. As already indicated, the three-tier dispute settlement dispute proposed by the Special Rapporteur was supported by some members, but criticized by others. The former described it as well-balanced and realistic, whereas the latter viewed it as too rigid, somewhat cumbersome and costly: too rigid, with the result that it undermined the freedom of choice which States enjoyed

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73/ See note 68 above.

under current international law and Article 33 of the Charter; cumbersome in that it required the exhaustion of a series of procedures spreading over at least three years during which any countermeasures would have the time to do immense harm to the economy of the allegedly wrongdoing State; and costly, since exorbitant fees would have to be borne by the parties. The remark was also made that the proposed system might affect the dispute settlement regimes provided for by pre-existing bilateral and multilateral treaties and difficult to reconcile with those regimes. It was suggested that the Special Rapporteur should seek guidance from the Optional Protocol concerning the Compulsory Settlement of Disputes relating to the four Conventions on the Law of the Sea of 1958 or, alternatively, consider conferring compulsory jurisdiction to the International Court of Justice in respect of the articles on State responsibility.

259. Some members made suggestions which retained some of the elements of the system proposed by the Special Rapporteur but departed from it in other respects. Thus, one member suggested a scheme whereby, in the first stage, the injured State would demand the cessation of the wrongful act. If the wrongdoing State failed to respond, there would be a second stage during which the injured State would have to exhaust in good faith all the possibilities for getting the wrongdoing State to take part in amicable settlement procedures. In the event of failure, the injured State would initiate the third stage by exercising its right to bring its case before a conciliation commission and then to institute the procedures provided for in articles 3 to 5 of the draft. If the first stage was successful or, in other words, in the event of the cessation of the wrongful act and reparation granted to the victim State as well as in the event of the successful efforts to ensure the implementation in good faith of an amicable settlement procedure, there would be no room for countermeasures and the injured State would be authorized only to take provisional measures of protection, including provisional countermeasures, for the sole purpose of protecting its interests and encouraging the State which had committed the wrongful act to move on to the first stage or the second. In the event of total failure, the injured State might have recourse to a conciliation commission and then, as proposed by the Special Rapporteur, go on to arbitration and judicial settlement.

260. Another member suggested that, in case an internationally wrongful act was committed, the injured State should be called upon to initiate negotiations with the wrongdoing State, with the two parties seeking settlement in accordance with the procedures provided for in Article 33, paragraph 1, of the Charter; if no settlement was reached within six to eight months, either party would be entitled to have recourse by unilateral application to the International Court of Justice. The allegedly injured State would be entitled to take some countermeasures only after the expiry of the six to eight month period and on condition that the Court had not by then been seized of the dispute.

261. Referring to the comments reflected in paragraph 258 above, the Special Rapporteur said he doubted that the proposed system was more complicated or laborious than a negotiation without any specific timetable or more costly than the consequences of a so-called countermeasure applied mistakenly. As to the possibility, referred to in paragraph 260 above, of authorizing each of the parties to go directly to arbitration or judicial settlement, he said that he personally preferred a more flexible regime in which judicial settlement would play only a limited role.

262. As regards the specific procedures to be envisaged, regret was expressed that no mention should be made, in the Special Rapporteur's proposals, of negotiation. Emphasis was placed on the prominent role of negotiations under Article 33 of the Charter and the question was asked whether parties could realistically be expected to resort to other procedures as long as meaningful negotiations remained a possible avenue.

263. The Special Rapporteur indicated in reply that negotiation would certainly come before recourse to the Conciliation Commission and could go on not only throughout conciliation, since the Conciliation Commission's main task was to serve as an intermediary between the parties and try to bring them to an agreement, but also after the conclusion of the conciliation endeavour and the presentation by the Commission of its final report.

264. As already indicated (see para. 247 above), draft article 1 74/ was viewed as lending itself to an interpretation whereby the proposed procedure would apply only to disputes relating to countermeasures. The remark was made in this connection that while a dispute following the adoption of a countermeasure usually related to that measure, it could also go further and involve the allegation of a breach of a primary or secondary rule where such a breach might not have given rise to a dispute before the adoption of the countermeasure. To make that point more clearly, it was suggested to replace the word "following" by "on account of" or "because of". According to another observation, the Conciliation Commission would, under article 1, deal with "a dispute which has arisen following the adoption by the ... injured State of any countermeasures". It was asked, however, how the Conciliation Commission could be responsible for determining the existence of a dispute - or, in other words, be vested with the power to conclude, as appropriate, that there was no dispute - when the injured State had in fact taken countermeasures.

265. The Special Rapporteur indicated in reply that, according to the system he was proposing, the reaction of the State against which the countermeasure was taken would take the form of a protest or a demand for the cessation of the countermeasure or, possibly, of a counter-countermeasure. He was proposing that the Conciliation Commission should be left to decide whether or not there was a dispute because it would be the first third party to hear the case and he had chosen the dispute rather than the countermeasure having given rise to an objection as the triggering mechanism because the idea of a dispute offered a fairly objective criterion that was established in the practice and doctrine of international law. The dispute would be the result of the

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74/ Reading as follows:

"Conciliation

If a dispute which has arisen following the adoption by the allegedly injured State of any countermeasures against the allegedly law-breaking State has not been settled by one of the means referred to in article 12 (1) (a) or has not been submitted to a binding third-party settlement procedure within [four] [six] months from the date when the measures have been put into effect, either party [to the dispute] is entitled to submit it to a Conciliation Commission in conformity with the procedure indicated in the Annex to the present articles."

conflict between the conclusion of wrongfulness of the State targeted by the countermeasure and the rejection of that conclusion by the State taking the measure.

266. With respect to draft article 2, 75/ some members referred in general terms to the role played by conciliation in the practice of States. One of them observed that conciliation had only rarely been used in Africa, where preference had so far been given to the political settlement of disputes in the context of inter-State conferences. Another member recalled, however, that conciliation had been successfully used in distributing the joint assets of the East African Community upon its dissolution. He further referred to the successful intervention of a conciliation commission in the Jan Mayen Island dispute, resulting in a recommendation on a joint development agreement for an area with significant prospects of hydrocarbon production.

75/ Reading as follows:

"Task of the Conciliation Commission

1. In performing the task of bringing the parties to an agreed settlement, the Conciliation Commission shall:

(a) examine any question of fact or law which may be relevant for the settlement of the dispute under any Part of the present articles;

(b) where appropriate, order, with binding effect:

(i) the cessation of any measures taken by either party against the other;

(ii) any provisional measures of protection it deems necessary;

(c) resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

2. Failing conciliation of the dispute, the Commission shall submit to the parties a report containing its evaluation of the dispute and its settlement recommendations."

Conciliation was described as a useful procedure involving aspects of institutionalized negotiations, encouraging dialogue and inquiry, providing information as to the merits of the positions taken by the parties and resulting in a suggested settlement corresponding to what each party deserved, not what it claimed.

267. Comments on the text proposed by the Special Rapporteur for draft article 2 focused on (1) the fact-finding function assigned to the Conciliation Commission; (2) the idea of authorizing the Commission to order the cessation of measures taken by either of the parties or to institute any provisional protective measures it considered necessary; and (3) the nature of the Conciliation Commission's report.

268. On the first point, the remark was made that the initial question that must be answered in a dispute on State responsibility was whether or not an allegedly wrongdoing State had in fact committed a breach of an international obligation. Attention was drawn in that context to the Dogger Bank case and to Additional Protocol I to the Geneva Conventions. It was noted that, in the Special Rapporteur's draft, the fact-finding function would be performed by the Conciliation Commission. According to one view, this approach was correct. According to another view, a kind of commission of inquiry with competence limited to fact-finding would be more acceptable to States and thus easier to establish. It was suggested that States should be given an opportunity to have a fact-finding inquiry carried out by an international authority or under its authority, along the lines of the mandate entrusted to the Secretary-General of the United Nations in the Rainbow Warrior case.

269. On the second point, some members, while recognizing that decision-making powers were not normally given to a conciliation commission, considered them appropriate in the context of subparagraph (b) to make sure that certain interests were not prejudiced. Protective measures were also needed, it was remarked, pending the implementation of a non-binding recommendation of a conciliation commission.

270. Other members observed that assigning to a conciliation commission the task of ordering measures ran counter to the normal understanding of conciliation which, unlike arbitration and judicial settlement, aimed at persuading rather than dictating.

271. Still other members found merit in the idea of conferring upon the Commission conciliation powers for the substance of the problem and decision-making powers for the provisional measures of protection, but observed that even such a regime would have little chance of being adopted by States and could only be envisaged in an additional protocol or in a special article subject to the approval of States by way of an optional declaration separate from the ratification of the future convention.

272. As regards the third of the points mentioned in paragraph 267 above, the remark was made that, although the report of the Conciliation Commission was recommendatory in nature, the Special Rapporteur none the less imparted a compulsory element to it by saying that a State could have recourse to compulsory arbitration when no settlement had been reached after submission of the report.

273. Replying to the questions raised in connection with draft article 2, the Special Rapporteur emphasized that the reference in paragraph 1 of draft article 2 to the Conciliation Commission "bringing the parties to an agreed settlement" meant conciliation, and nothing more. The proposed text, his report and his introductory statement made it clear that the Conciliation Commission did not have the power to decide on the merits of the dispute. It was only an ordinary conciliation body whose task involved recommendations and mediation. One of the procedures that he had suggested for the Conciliation Commission was the possibility of its ordering, where appropriate, the cessation of any measures taken by either party, provisional measures of protection, and fact-finding, obviously by an ad hoc body. Those were the only points where he favoured a departure from the general practice governing conciliation.

274. As regards draft article 3, 76/ it was suggested (1) that the contradiction between article 3 and paragraphs 6-9 of article 3 of the Annex be eliminated; (2) that the question of the lawfulness of countermeasures be submitted from the start to arbitration (although such an approach would have the drawback of eliminating the conciliation stage which was often quite useful); and (3) that, in case of failure of the conciliation, the parties be under an obligation to resort to arbitration.

275. Replying to suggestion (1), the Special Rapporteur pointed out that the lamented discrepancy was due to a last-minute error with regard to the relationship between the reference to "special agreement" in draft article 3 and the reference to the same concept in paragraphs 6-9 of the Annex. The error would be corrected in order to explain the different role of compromis in draft article 3 and in paragraphs 6-9 of the Annex. He was grateful for the indication. As for suggestions (2) and (3), the Special Rapporteur would have no objection to moving directly to arbitration. He only believed that conciliation might be more easily accepted as a first step.

76/ Draft articles 3 and 4 read as follows:

"Article 3

Arbitration

Failing the establishment of the Conciliation Commission provided for in article 1 or failing an agreed settlement within six months following the report of the Conciliation Commission, either party is entitled to submit the dispute for decision, without special agreement, to an Arbitral Tribunal to be constituted in conformity with the provisions of the Annex to the present articles.

Article 4

Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effects any issues of fact or law which may be of relevance under any of the provisions of the present articles, shall operate under the rules laid down or referred to in the Annex to the present articles and shall submit its decision to the parties within [six] [ten] [twelve] months from the date of [completion of the parties' written and oral pleadings and submissions] [its appointment].

2. The Arbitral Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party."

276. The approach in draft article 5 77/ was described as amounting to a radical revision of the system of adjudication at the international level, particularly that of the International Court of Justice, inasmuch as it made consensual jurisdiction compulsory in respect of a number of questions, some of which might not even qualify as legal matters. It was also said that, because the Court worked so slowly, its intervention might have serious consequences for the interests at stake, particularly those of the injured State. It was nevertheless pointed out that the Court had amended its rules of operation in order to facilitate the constitution of ad hoc chambers, a solution which was extremely interesting, especially from the point of view of costs. Other comments included (1) the suggestion that draft article 5 be written in such a way that the right of access of poor countries to the Fund referred to in paragraph 238 above was preserved and (2) the remark that paragraph (a) (i) would be improved if the words "such failure" were replaced by the "submission of the report of the Conciliation Commission".

77/ Reading as follows:

"Judicial settlement

The dispute may be submitted to the International Court of Justice for decision:

(a) by either party:

(i) in case of failure for whatever reason to set up the Arbitral Tribunal provided for in article 4, if the dispute is not settled by negotiation within six months of such failure;

(ii) in case of failure of the said Arbitral Tribunal to issue an award within the time-limit set forth in article 4;

(b) by the party against which any measures have been taken in violation of an arbitral decision."

277. Draft article 6 78/ was described by one member as not particularly innovative. The remark was however made that, since the idea of *excès de pouvoir* was open to interpretation as the text now stood, the jurisdiction of the Court should be more limited. Another observation was that the article made the Court an appeal court of sorts: such an approach, already reflected in some conventions, was viewed as quite appropriate as part of the progressive development of international law and it was suggested that a wider appeal jurisdiction not limited to cases of *excès de pouvoir* or violations of procedure be envisaged for the Court.

278. Some members proposed to include additional elements in the three-tier dispute settlement regime proposed by the Special Rapporteur. More specifically, it was suggested (1) that room be made in the draft for advisory opinions of the International Court of Justice along the lines suggested by the President of the Court in his statement before the General Assembly in 1991 and (2) that a more prominent role be given to the chambers procedure of the court.

78/ Reading as follows:

> "*Excès de pouvoir or violation of fundamental principles of arbitral procedure*
>
> Either party is entitled to submit to the International Court of Justice any decision of the Arbitral Tribunal tainted with *excès de pouvoir* or departing from fundamental principles of arbitral procedure."

279. As regards the Annex, 79/ one member wondered if States would accept

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79/ Reading as follows:

"Annex

Article 1

Composition of the Conciliation Commission

Unless the parties concerned agree otherwise, the Conciliation Commission shall be constituted as follows:

The Commission shall be composed of five members. The parties shall each nominate one commissioner, who may be chosen from among their respective nationals. The three other commissioners shall be appointed by agreement from among the nationals of third States. These three commissioners must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties. The parties shall appoint the President of the Commission from among them.

Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

If the appointment of the commissioners to be designated jointly is not made within the period for making the necessary appointments, the appointment shall be entrusted to a third State chosen by agreement between the parties, or on request of the parties, to the President of the General Assembly of the United Nations, or, if the latter is not in session, to the last President.

If no agreement is reached on either of these procedures, each party shall designate a different State, and the appointment shall be made in concert by the States thus chosen.

If, within a period of three months, the two States have been unable to reach an agreement, each of them shall submit a number of candidates equal to the number of members to be appointed. It shall then be decided by lot which of the candidates thus designated shall be appointed.

In the absence of agreement to the contrary between the parties, the Conciliation Commission shall meet at the seat of the United Nations or at some other place selected by its President.

The Commission may in all circumstances request the Secretary-General of the United Nations to afford it his assistance.

The work of the Conciliation Commission shall not be conducted in public unless a decision to that effect is taken by the Commission with the consent of the parties.

In the absence of agreement to the contrary between the parties, the Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to enquiries, the Commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Part III of The Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907.

In the absence of agreement to the contrary between the parties, the decisions of the Conciliation Commission shall be taken by a majority vote, and the Commission may only take decisions on the substance of the dispute if all members are present.

Article 2

Task of the Conciliation Commission

1. The tasks of the Conciliation Commission shall be to elucidate the question in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.

2. At the close of the proceedings, the Commission shall drawn up a procès-verbal stating, as the case may be, either that the parties have come to an agreement and, if need arises, the terms of the agreement, or that it has been impossible to effect a settlement. No mention shall be made in the procès-verbal of whether the Commission's decisions were taken unanimously or by a majority vote.

3. The proceedings of the Commission must, unless the parties otherwise agree, be terminated within six months from the date on which the Commission shall have been given cognizance of the dispute.

4. The Commission's procès-verbal shall be communicated without delay to the parties. The parties shall decide whether it shall be published.

Article 3

Composition of the Arbitral Tribunal

1. The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The two other arbitrators and the Chairman shall be chosen by common agreement from among the nationals of third States. They must be of different nationalities and must not be habitually resident in the territory nor in the service of the parties.

the appointment of their candidates by lot. He suggested that the task of establishing the Conciliation Commission be entrusted to the Secretary-General, as proposed by Mr. Riphagen. In the case of arbitration, one member felt that provision should be made for the intervention of a third-party - possibly the President of the International Court of Justice - in case one of the States failed to appoint an arbitrator.

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2. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third State, chosen by agreement between the parties, shall be requested to make the necessary appointments.

3. If no agreement is reached on this point, each party shall designate a different State, and the appointments shall be made in concert by the States thus chosen.

4. If, within a period of three months, the two States so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a national of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

5. Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

6. The parties shall draw up a special agreement determining the subject of the dispute and the details of the procedure.

7. In the absence of sufficient particulars in the special agreement regarding the matters referred to in the preceding article, the provisions of The Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907 shall apply so far as is necessary.

8. Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by either party.

9. If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply, subject to the present articles, the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide ex aequo et bono."

(iv) Follow-up work on the proposals of the Special Rapporteur

280. Many members pointed out that the Commission's work on the topic of State responsibility had been based for several years on the assumption that there would be a Part Three, as shown by the fact that the proposals on that point made by the previous Special Rapporteur had been referred to the Drafting Committee in 1986. They therefore considered that the time had come for the Committee to begin drafting Part Three, bearing in mind the links which, in their view, existed between that part of the draft and article 12, and to an even larger extent with the regime of countermeasures.

281. Other members reserved their position on the matter. According to one view, it was inappropriate to link the dispute settlement regime to countermeasures and the Special Rapporteur's proposed Part Three deprived States of their freedom of choice as regards dispute settlement procedures. According to another view, the question of the settlement of disputes and that of countermeasures were not so much part of the topic of State responsibility as of enforcement measures and, for the time being, the Commission should therefore focus its attention on Part One and chapter I of Part Two (on reparation), including the question of crimes. According to a third opinion, it was artificial to establish a link between article 12 and Part Three and tying a Part Three that could not float to Parts One and Two risked sinking the whole project.

282. In summing up the discussion, the Special Rapporteur indicated that a large majority of members of the Commission were in favour of strengthening the role of the judge in the field of State responsibility, supported the idea that a dangerous regime of countermeasures should be supplemented by provisions on the settlement of disputes and preferred the more realistic solution outlined in paragraph 251 above to the "ideal" solution described in the same paragraph, thus demonstrating their seriousness and sense of responsibility. According to that solution, the lawfulness of the adoption of countermeasures depended on the exhaustion of the procedures "available" under present or future arrangements which might be binding on the injured State and on the wrongdoing State quite apart from the instrument being prepared (art. 12). In the event of the adoption of a countermeasure, the door would be open to the system for the settlement of disputes provided for by the future convention. The Special Rapporteur noted that his proposals on that point had received considerable support, although a number of changes had been proposed. He expressed the hope that the Commission, by adopting rules along

the main lines of his proposals, would be able to persuade States that the exercise of their prerogatives in respect of countermeasures should be subject to the impartial *a posteriori* controls which he favoured. The whole debate showed above all, in the view of the Special Rapporteur, the existence of a very close link - which should not be underestimated - between article 12 as proposed by him, on the one hand, and Part Three, on the other hand.

(b) The consequences of the international "crimes" of States

283. As indicated in paragraph 205 above, Chapter II of the fifth report dealt with the consequences of the so-called international "crimes" of States. Due to lack of time, however, the Commission was unable to consider Chapter II at the present session. It nevertheless deemed it advisable for the Special Rapporteur to introduce this chapter, in order to expedite work on the topic at the next session.

284. In introducing Chapter II of his fifth report, the Special Rapporteur drew attention to section 1 containing a historical survey of the question of the consequences of international crimes of States, including a summary of the discussions in the Commission in 1976 and in the Sixth Committee as well as the relevant literature. This historical background, in terms of previous debates and doctrine, provided the essential starting point for identifying the issues elaborated on in Chapter II, sections 2 and 3.

285. The Special Rapporteur noted that according to article 19 of Part One of the draft articles, crimes consisted of serious breaches of *erga omnes* obligations designed to safeguard the fundamental interests of the international community as a whole. That did not imply, however, that all breaches of *erga omnes* obligations were to be considered as crimes. The basic problem was to assess to what extent the fact that the breach seriously prejudiced an interest common to all States affected the complex responsibility relationship which arose even in the presence of "ordinary" *erga omnes* breaches.

286. The Special Rapporteur felt that the best approach was to distinguish between the objective and subjective aspects of the issue. From an objective viewpoint, the question was whether and in what way the severity of the breaches in question aggravated the content and reduced the limits of the consequences - substantive and instrumental - that characterized an "ordinary" *erga omnes* breach, namely a delict. From a subjective viewpoint, the question was whether or not the fundamental importance of the rule breached gave rise to any changes in the otherwise inorganic and not "institutionally"

coordinated multilateral relations that normally arose in the presence of an ordinary breach of an erga omnes obligation under general law, either between the wrongdoing State and all other States or among the multiplicity of injured States themselves.

287. The Special Rapporteur first addressed the substantive consequences, namely cessation and reparation. With regard to cessation, he felt that crimes did not present any special character in comparison with "ordinary" wrongful acts, whether or not erga omnes, for two reasons. First, the obligation of cessation was not susceptible of a "qualitative" aggravation, attenuation or modification; and second, what was involved, even in the case of delicts, was an obligation incumbent on the responsible State even in the absence of any demand on the part of the injured State or States. While his fifth report provided some examples of relevant State practice, an extended analysis of practice in that area would be appropriate at a later stage, following debates in the Commission and the General Assembly, from which he expected the indispensable guidance.

288. The Special Rapporteur considered the issue of reparation lato sensu, which encompassed restitutio, compensation, satisfaction and guarantees of non-repetition, to be more complex than the issue of cessation. From an objective standpoint, some of the forms of reparation, especially restitutio and satisfaction, were subject, in the case of delicts, to certain limits. Thus it had to be determined whether, in consequence of a crime, such limits were subject to derogation and, if so, to what extent. One must determine, in other words, whether, in the case of crimes, the "substantive" obligations were more burdensome for the wrongdoing State than in the case of "ordinary" breaches.

289. The Special Rapporteur envisaged three possible derogations: (1) the excessive onerousness limitation for restitutio; (2) the prohibition of "punitive damages", humiliating demands or demands affecting matters generally considered to pertain to the freedom of States; and (3) demands for satisfaction or guarantees against repetition strongly affecting the area of the domestic jurisdiction of the wrongdoing State.

290. As to the subjective aspect, the Special Rapporteur noted that, unlike the case of cessation, the forms of reparation were covered by obligations which the responsible State was required to perform only upon demand by the injured party. Since a crime always involved a plurality of States and possibly, in many cases, States less directly injured than a "principal

victim", it must be asked whether, in the current state of international law, each of those States was entitled to claim reparation uti singulus or whether the lex lata required some mandatory form of coordination among all the injured States. His report provided examples of cases in which demands had been made by individual States (other than the "principal victim") as well as by international or regional bodies.

291. The Special Rapporteur believed that once the lex lata on those points had been clarified, it would be possible to assess whether and to what extent it was appropriate to provide correctifs, or radical innovations, by way of progressive development, particularly with respect to coordination between the demands of several injured States.

292. Turning to the "instrumental" aspects of the possible special consequences of crimes, compared with delicts, the Special Rapporteur noted that the first hypothesis that naturally sprang to mind was the reaction to aggression. While the Commission had already dealt with self-defence in Part One of the draft, it needed to provide clear definitions for some of the requirements traditionally considered to be conditions of self-defence, namely, immediacy, necessity and proportionality, the first two of which were often overlooked. It would also have to clarify under what circumstances and preconditions the right of "collective" self-defence included the use of armed force against an aggressor by States other than the main target of the aggression. This raised the following issues: was such recourse legitimate only at the express request of the victim State; was a presumption of that State's consent sufficient; or could the third State's reaction follow automatically in such situations? The Special Rapporteur felt that the Commission should adopt a position on those issues, even if it preferred not to lay down express provisions governing them, but rather to refer simply to the "inherent right of individual or collective self-defence". Nevertheless, a simple commentary on the meaning of such "inherent right" would not suffice to prevent dangerous misunderstandings, especially with regard to the requirements of immediacy and necessity.

293. The Special Rapporteur emphasized that the problem of resort to force in response to an international crime was not solely a question of self-defence against armed attack. He asked whether armed measures were not admissible also in order to bring about the cessation of crimes other than aggression that were listed in article 19, paragraph 3 (b), (c) and (d): a problem which presented above all an objective aspect. He queried whether resorting to

force in order to obtain cessation was admissible in circumstances other than those justifying self-defence against armed attack, for example, armed support to peoples oppressed by alien domination or more generally by regimes committing grave violations of the principle of self-determination; and armed intervention against a State responsible for large-scale violations of fundamental human rights, genocide or violent forms of "ethnic cleansing".

294. The Special Rapporteur noted that if in such cases the use of armed force were to be deemed admissible *de lege lata* or desirable *de lege ferenda*, the question arose as to whether that would constitute the standard sanction for a crime, namely, a reaction against the wrongdoing State under the law of State responsibility, or whether it would correspond to a different *ratio*, such as that underlying the state of necessity or distress - circumstances which ruled out illegitimacy but, unlike self-defence, were not characterized by the authorization of a direct reaction against the perpetrator of a particularly serious international breach.

295. The Special Rapporteur drew attention to another problematic aspect of resort to force in response to a crime, namely whether armed countermeasures were admissible when they were intended not to bring about the cessation of a crime in progress but to obtain reparation *lato sensu* or adequate guarantees of non-repetition. An example was the *debellatio* of a State which had started a war of aggression, including military occupation of that State by the victors or other sanctions imposed by force of arms in order to "undo" all the consequences of the crime. The situation of post-war Germany was a case in point. More recently, the possibility, contemplated in paragraph 33 of Security Council resolution 687 (1991), of using force to guarantee the disarmament obligations imposed on Iraq by that resolution, raised the question of how far resort to force was legitimate in such cases.

296. The subjective aspect of the instrumental consequences of crimes involving armed force gave rise to a different problem: did the admissibility of armed measures vary depending on whether they were taken by one or more injured States *uti singuli* or by the community of States *uti universi*? Were such measures considered inadmissible if they were resorted to unilaterally by one or a small group of injured States and legitimate if they were the expression of a "common will" of the organized international community?

297. The Special Rapporteur characterized this problem as central to the entire regime of crimes, not just to the regime of armed measures aimed at cessation. It arose in connection with a number of substantive consequences

and affected all the instrumental consequences whenever the regime of international crimes of States involved the possible competence of the international community as a whole or of the organized international community. There were examples of injured States dealing with the consequences of a very serious breach - particularly one in progress - by means of the intervention of an international body belonging to a system of which the wrongdoing State was also a member. The actions of United Nations organs, and the Security Council in particular, were of special relevance in that respect. His report provided several examples of such "organic" armed or non-armed reactions to very serious breaches.

298. These precedents were frequently invoked to support the notion that the competence to adopt sanctions against particularly serious international delinquencies did not, and should not, belong to States *uti singuli*. The question was thus raised whether that competence should not belong instead, more or less exclusively, *de lege lata* and/or *de lege ferenda*, to the so-called organized international community, as represented by the United Nations and, in particular, the Security Council as the organ endowed with the greatest powers of action. A considered juridical answer to this question for the purposes of codification or progressive development of the legal consequences of crimes, as distinguished from a mere *constat* of actual conduct, would require an analysis of issues situated at the very apex of the international legal system. Those issues ranged from the nature of the international community, the inter-State system and the organized international community to the nature of the United Nations and the functions and powers of its organs.

299. Letting aside the more general among such questions, the Special Rapporteur emphasized as the central issue whether and to what extent the various functions and powers of the United Nations organs in the areas of international law covered by the hypothesis contemplated by article 19 of Part One were or should be made legally suitable for the implementation of consequences of international crimes. Three specific questions then arose: first, *de lege lata*, whether the existing powers of United Nations organs, such as the General Assembly, the Security Council and the International Court of Justice, included the determination of the existence, the attribution and the consequences of the wrongful acts contemplated in article 19; second, *de lege ferenda*, whether and in what sense the existing powers of those organs should be legally adapted to those specific tasks; and third, to what extent

the powers of United Nations organs affected or should affect the *facultés*, the rights or the obligations of States to react to the internationally wrongful acts in question, either in the sense of substituting for individual reactions, or in the sense of legitimizing, coordinating, imposing or otherwise conditioning such individual reactions.

300. Starting with the first question, the Special Rapporteur stressed that the issue was not whether a United Nations body had in fact taken some action, in the form of a decision, recommendation or a concrete measure, with regard to international crimes as defined in article 19, paragraph 3. The question was, *de lege lata*, whether any United Nations body had exercised, as a matter of law (written or unwritten), the specific function of determining that such conduct had occurred and that it had constituted a crime of one or more given States, and of determining the resulting liability and applying sanctions or contributing to their application. Only on such a basis would it be possible to determine whether a legally organized reaction to international crimes of States was provided *de lege lata*. It was difficult to answer that question by comparing the various kinds of international crimes contemplated in subparagraphs (a) to (d) of paragraph 3 of article 19 with the functions and powers vested in the United Nations organs. For the present purpose, his remarks would be limited to some of the points relating to this question.

301. The General Assembly, as the most representative body of the inter-State system, was surely the competent organ *ratione materiae* under the Charter for the promotion and protection of human rights and of self-determination of peoples. At the same time, the Charter did not endow the General Assembly with such powers as would enable it to produce an adequate reaction to violations of human rights and self-determination or of other obligations of the kind contemplated in subparagraphs (b) to (d) of paragraph 3 of article 19. With regard to such acts, the General Assembly could not go beyond non-binding declarations of unlawfulness and of attribution and non-binding recommendations of reaction by States or by the Security Council.

302. The Security Council, for its part, was competent *ratione materiae* for the maintenance of international peace and security. Its powers under the Charter enabled it to provide for an adequate reaction in the form of economic, political or military measures against the crime of aggression mentioned in subparagraph (a) of paragraph 3 of article 19. The Council could also react through the same measures against any crime, among those envisaged in subparagraphs (b), (c) and (d) of paragraph 3 of article 19, provided,

however, that they corresponded to situations of the kind contemplated in Article 39 of the Charter. The Security Council was empowered under Chapter VII to assess discretionally any situation involving a threat to peace, a breach of the peace or an act of aggression, with a view to maintaining or restoring international peace and security. However, the Council had neither the constitutional function nor the technical means to determine the existence, the attribution or the consequences of any wrongful act. Its competence to decide on the existence of one of those situations was confined to the purposes of Articles 39 et seq. of Chapter VII of the Charter.

303. The above consideration did not dispose entirely of the issue of the Council's competence. Although that body had not been entrusted by the drafters of the Charter with the task of determining, attributing and sanctioning the serious breaches in question, a different situation might exist at present. The question might indeed be asked, in particular, whether recent practice did not show that the scope of the Council's competence had undergone an evolution with regard precisely to the "organized reaction" to certain types of particularly serious international delinquencies. He was referring to some recent less easily justifiable decisions, under Charter language, such as resolution 687 (1991) in so far as it imposed upon Iraq reparations for "war damage", resolution 748 (1992) which allowed the taking of measures against the Libyan Arab Jamahiriya for the failure to extradite the alleged perpetrators of a terrorist act, and resolution 808 (1993) on the establishment of an ad hoc international tribunal for the prosecution and trial of crimes committed by members of the various factions in the current conflict in the Balkans. In order to regard that practice as concurring to consolidate the Council's competence in the area of State responsibility for crimes - a problematic proposition - one would have to produce convincing arguments to the effect that it constituted a "juridically decisive" practice, reflecting a customary rule or a tacit agreement accepted or adopted by the United Nations membership and apt as such to derogate from the written provisions of the Charter.

304. Actually, the International Court of Justice was the only existing permanent body which possessed the competence and the technical means to determine the existence, attribution and consequences of an internationally wrongful act, including possibly a crime of State. It was the function of the Court "to decide in accordance with international law" (Art. 38, para. 1 of the Statute) and its pronouncements possessed "binding force between the

parties" to the dispute (Art. 59 of the Statute). Those two features of the Court's function, as well as its composition, made it in principle more suitable than any other United Nations organ to rule on the existence and legal consequences of an internationally wrongful act. There were, however, two sets of serious difficulties.

305. First, the Court's system involved a major difficulty in that its jurisdiction was essentially voluntary. For the Court to be entitled to exercise its jurisdiction with regard to a crime, its competence would have to derive from a prior acceptance by the alleged wrongdoer of the Court's jurisdiction in such terms as to allow the injured State or States to summon unilaterally the alleged wrongdoer before the Court. That could result either from the acceptance by all States (wrongdoer included) of the so-called "optional clause" of Article 36, paragraph 2, of the Statute, or by virtue of multilateral, bilateral or unilateral instruments binding the participating States in such a way as to allow unilateral applications to the Court against the wrongdoer. The only other way would be a very improbable ad hoc acceptance of the Court's competence by the wrongdoer itself.

306. A further series of difficulties arose from the absence of organs juridically empowered to investigate the facts, to play the role of public prosecutor in bringing a case to the Court and to determine the sanctions. The implementation of any State's responsibility pronounced by the Court would thus escape any control by the Court itself. Any "sanction" other than the mere finding of the breach and its attribution would thus have to be determined and applied either by the injured party or parties or be left to the discretional action of other United Nations bodies.

307. The Special Rapporteur then turned to the second question, namely whether de lege ferenda the existing functions and powers of United Nations organs should or could be legally adjusted to the determination of the existence, attribution and consequences of international crimes of States. The question arose whether the Security Council - with a restricted composition in which some members enjoyed a privileged status - should be vested with the competence to act for the "international community as a whole" in the matters in question. As a political body, the Council was entrusted with the essentially political function of maintaining peace, so that it operated with a high degree of discretion; it acted neither necessarily nor regularly in all the situations that would seem to call for action; it operated, on the contrary, in a selective way. The Council was not bound to use uniform

criteria in seemingly similar situations; crimes of the same kind and gravity could be treated differently or not be treated at all. Indeed, serious crimes could be ignored. Lastly, the Council was under no duty to state the reasons for its decisions or its action or inaction. That fact precluded contemporary or subsequent verification of the legitimacy of its choices.

308. Those difficulties could perhaps be accepted as unavoidable drawbacks of the prevention and repression of aggression and other serious breaches of the peace. One could accept, for lack of a better solution, that a political body should operate without the guarantees of a judicial process, which was inevitably uncertain and always much too slow.

309. Whatever the position regarding aggression, the propriety of relying too much on political bodies for the implementation of State responsibility for crimes was highly questionable with regard to the other delinquencies contemplated in subparagraphs (b), (c) and (d) of paragraph 3 of article 19, which should be met by judicial means. The history of the penal law in national societies showed that, in the repression of criminal offences, the following three features were essential: (1) subjection to the rule of law, procedural as well as substantive; (2) regular, continuous and systematic conduct of criminal prosecution and trial; (3) impartiality - or non-selectivity - of such action as to investigation, prosecution and pronouncement. For those reasons, the Security Council did not seem to meet the requirements of criminal justice or indeed those of justice in general. Rather, he believed that the Commission should consider the possibility of improving on the 1985-1986 dispute settlement proposal by the previous Special Rapporteur, Mr. Riphagen, particularly article 4 (b) of his proposed Part Three which provided a role for the International Court of Justice with respect to article 19. The Special Rapporteur requested guidance from the Commission on this matter which was not covered in his proposed Part Three.

310. The Special Rapporteur then considered the third issue, namely the relationship between the reaction of the organized community through international bodies such as United Nations organs and the individual reaction of States. The possibility of the organized community adopting measures against a criminal State posed the problem of harmonizing the exercise of that competence with the carrying out of those measures which the injured State or States might still be entitled to adopt unilaterally, as indicated by the examples discussed in his report.

311. The Special Rapporteur then considered resort to measures short of force in reaction to a crime which - unlike the adoption of measures involving force - did not give rise to problems of admissibility; those questions were generally settled in the affirmative with respect to any erga omnes breach. Such measures did not give rise to the problem of the possible aggravation of the measures taken by way of reaction to crimes. Such aggravation might take the form of the removal or the attenuation of the conditions or limitations to which resort to countermeasures was subjected.

312. Regarding the conditions, the question arose whether, in the case of crimes, resort to countermeasures should not be admissible even in the absence of prior notification and also prior to the implementation of available dispute settlement procedures.

313. With respect to the limitations, namely the limitations to countermeasures, it was possible to conceive the setting aside, in the case of crimes, of such limitations as those concerning: (i) extreme measures of economic or political nature; (ii) measures affecting the independence, sovereignty or domestic jurisdiction of the wrongdoer; (iii) measures affecting "third" States; and (iv) "punitive" measures, as illustrated in his report.

314. As to the "subjective" element, the Special Rapporteur drew attention to several "subjective-institutional" questions. First, did the possible attenuations of the limitations of recourse to "peaceful" countermeasures apply only to the "principal victim" of a crime or should they benefit all States in any way injured? Or did the entire handling of any countermeasures belong to the organized international community? Second, if such "collective" competence existed - or ought to be provided for - also in respect of measures not involving the use of arms, would it be an "exclusive" or only a "primary" competence? Third, in the latter case, in what manner would the "collective" competence be coordinated with the residual faculty of unilateral action on the part of the injured State or States?

315. The Special Rapporteur drew attention to the problem of obligations to react on the part of the injured States. Foremost among them was the obligation not to recognize as "legal and valid" the acts of the wrongdoing State pertaining to the commission of the breach or the follow-up thereof. In addition to the duty of non-recognition, international practice showed a trend in favour of recognizing the obligation of States not to assist the wrongdoing State to maintain or preserve the situation created by the unlawful act or to

enjoy any advantages resulting from acts of aggression and other major breaches. Moreover, States were under an obligation not to interfere with the response to a crime on the part of the "international community as a whole" and to carry out such decisions as were adopted by that community to sanction a crime. His report provided examples of relevant State practice in this area which would be further analyzed at a later stage.

316. The Special Rapporteur believed that the most important questions with regard to the consequences of international crimes were those which affected the role of the organized international community and, in particular, that of United Nations organs. Those questions were far too difficult to be dealt with in a casual manner. The picture was far from encouraging. Some might hold that it would be better to fall in with those who were not in favour of giving effect in Parts Two and Three to article 19 of Part One.

317. The Special Rapporteur pointed out that those who had criticized the adoption of article 19 could find arguments in the difficulties to which he had referred and also in the work of the Commission itself. With regard to the Commission, he referred to the broad thrust of the articles on State responsibility and of the draft Code of Crimes against the Peace and Security of Mankind, as well as what he termed the questionable approach adopted by the majority of the Commission concerning fault, including _dolus_, punitive damages and other consequences that did not come strictly within the context of reparation. The main question in this context was whether international criminal responsibility should be incurred by States, individuals, or both.

318. The Special Rapporteur observed in this connection that were it not for article 19, the Commission's work on international responsibility might seem, to an observer, to be based upon an implied dichotomy between an essentially "civil" responsibility of States, on the one hand, and a penal responsibility of individuals on the other. After an initial phase of indecision, the work on the draft Code of Crimes against the Peace and Security of Mankind was indeed firmly based on the assumption that the Code would cover only crimes of individuals, though the individuals in question would have close ties with the State. According to this dichotomy, individuals would be amenable to criminal justice, but States would not. On the basis of the maxim _societas delinquere non potest_ and of the negative attitudes in the Commission with regard to fault and the strictly compensatory nature of international responsibility, it could be argued that article 19 should be deleted as an illogical and contradictory element. He, however, could not subscribe unconditionally, for

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dismantling of industries; migration of inhabitants; reparation payments in money, goods or services; sequestration or confiscation of assets; armaments control; demilitarization; governmental supervision; together with many other international measures including the two general categories of economic and military sanctions. However, most of the measures listed not only included "civil" remedies but affected - some of them dramatically - the very peoples to be spared from sanction by confining the "legal penalties" to the rulers.

322. The Special Rapporteur felt that concealing these obvious truths, either by the omission of any reference to a punitive connotation of international responsibility or in the suggested express indication that the only function of countermeasures was to secure reparation, did not alter the hard realities of the inter-State system. Indeed the most respected authorities recognized that international responsibility presented civil and penal elements, the prevalence of one or the other depending upon the objective and subjective features and circumstances of each particular case, as discussed in his report.

323. The Special Rapporteur observed that a strong opponent of the idea underlying article 19 of Part One could contend - not without some justification - that, if States were at present not societates or personnes morales in the proper sense of the term, they would inevitably have to become so in a proper sense within an organized legal community of mankind. States would then not differ, in essence, from the subdivisions of a more or less decentralized federation. To the extent that this was a valid prediction, the same opponent could further contend that the Commission should maintain the distinction between a code of crimes against the peace and security of mankind covering exclusively the penal responsibility of individuals and a State responsibility convention contemplating merely the civil liability of States to the exclusion of article 19. According to the same opponent, this approach would harmonize the Commission's two existing drafts with the predicted progressive development of the international system towards the ultimate end represented by the establishment of a more or less centralized - or decentralized - organized community of mankind.

324. The Special Rapporteur, however, did not foresee such a development in the near future, even with respect to the 12 countries of the European Community. As an inevitable consequence, mankind would for a long time to come continue to be in a state of "disintegration", which was the main cause and effect of the perpetuation of a merely inter-State system as distinct from

a legal community of mankind. Within such a system, States remained under an international law which was inter-State law, not the law of the international community of mankind. States remained essentially factual, not juridical, collective entities and were as such not only able to commit unlawful acts of any kind, including so-called "crimes" and "delicts", but equally amenable to reactions comparable, mutatis mutandis, to those met by individuals found guilty of crimes in national societies.

325. The Special Rapporteur was in full agreement with that extensive literature which condemned "collective" responsibility. He was firmly convinced that collective responsibility was a decidedly primitive, rudimentary institution. He still found it difficult to deny the following points. The inter-State system presented from the standpoint of legal development rudimentary aspects that could not be ignored without danger. One such aspect was that States did commit, together with "ordinary" or "civil" delinquencies, delinquencies that qualified as "criminal" because of their gravity. Another aspect was that, for such grave delinquencies as aggression, States adopted severe and numerous forms of reaction. Even opponents of the penal responsibility of States had recognized - as noted earlier - such forms of reaction.

326. The Special Rapporteur found it hard to believe that measures of such tremendous weight were not, mutatis mutandis, similar in effect to the penalties of national criminal law. Since lawful reactions to the delinquencies contemplated in article 19 should be available for some time to come, the Commission should, in his view, try to do its best to provide, in Parts Two and Three of the draft, follow-up provisions to article 19. However, he cautioned that the problems to be solved, de lege lata or de lege ferenda, seemed even more difficult than those, not yet resolved satisfactorily, of collective security. He referred especially to the problems relating to the existing structure of the so-called "organized international community". While some of these issues, de lege lata or ferenda, had been summarily and tentatively evoked by him, he wished to raise three more issues.

327. The Special Rapporteur first drew attention to the crucial problem of distinguishing the consequences of an international State crime for the State itself - and possibly the State's rulers, on the one hand, and the consequences for the State's people, on the other. While recognizing the moral and political necessity of separating the political measures against the

delinquent State from the individual penalties against its responsible rulers, the Special Rapporteur questioned the amenability of measures that seemed to go beyond those contemplated in Articles 41 and 42 of the Charter to such a distinction, especially with regard to economic and peace-settlement measures (for the case of aggression) which seemed to directly affect the people. A further question was whether in any circumstances the people were totally exempt from guilt - and responsibility - for an act of aggression conducted by the despotic regime of a dictator enthusiastically applauded before, during and sometimes even after the act.

328. A second problem was that of State fault. In this regard, the Special Rapporteur wondered whether the Commission should not reconsider that matter which it had set aside, in his view unconvincingly, with regard to "ordinary" delinquencies. He asked whether it was possible for the members of the Commission to deal, as "material legislators", with the kind of breaches contemplated in article 19 without taking account of the importance of such a crucial element as wilful intent (dolus).

329. Lastly, the Special Rapporteur wished to conclude his remarks by drawing attention to some substantive questions relating to article 19 itself. The problematic features of its formulation, not the least of which was the unclear nature of the provision compared with the so-called "secondary" character of the other draft articles, should in his view be reconsidered by the Commission on second reading. In this respect, he merely noted that its formulation was perhaps less difficult in the original version proposed by the Special Rapporteur in 1976.

330. First, if there existed substantial or, in any event, significant differences in the manner in which the various specific types of crime were dealt with, was it appropriate to elaborate a single dichotomy between "crimes" and "delicts"? Would it not be preferable, for example, to distinguish aggression from other crimes? Or to make several subordinate distinctions, so as to avoid placing on the same footing specific acts that were obviously quite remote from one another and would or should entail equally different forms of responsibility?

331. Second, the exemplary list of wrongful acts constituting crimes contained in article 19 dated back to 1976. Were those still the best examples of the wrongful acts which the international community as a whole considered as "crimes of States" or should that list be "updated", assuming that such a list was desirable?

332. Third, in examining practice, it was often difficult to distinguish cases of crime from cases of delict, especially where very serious delicts were involved. Was not this difficulty partly due to the formulation of the general notion of crime in article 19, with wording characterized by certain elements that perhaps made it difficult to classify a breach as a crime or a delict and hence to ascertain which unlawful acts now came, or should come, under a regime of "aggravated" responsibility?

333. Fourth, if it was true that there existed a certain gradation from ordinary violations to "international crimes", especially from the standpoint of the regime of responsibility they entailed, was it in fact proper to make a clear-cut nominative distinction between "crimes" and "delicts"?

C. Draft articles of Part Two of the draft articles on State responsibility

1. Texts of the draft articles of Part Two provisionally adopted so far by the Commission

334. The texts of the draft articles of Part Two provisionally adopted so far by the Commission are reproduced below.

Article 1

1. The international responsibility of a State which, pursuant to the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in the present Part.

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

Article 2

Without prejudice to the provisions of articles 4 and [12], the provisions of this Part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Article 3

Without prejudice to the provisions of articles 4 and [12], the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present Part.

Article 4

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 5

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the present articles an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

Article 6

Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

Article 6 bis

Reparation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees on non-repetition, as provided in articles 7, 8, 10 and 10 bis, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

(a) the injured State; or

(b) a national of that State on whose behalf the claim is brought;

which contributed to the damage.

3. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

Article 7

Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation that existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) is not materially impossible;

(b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Article 8

Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

Article 10 80/

Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(a) an apology;

(b) nominal damages;

(c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

80/ The substance of art. 9 (Interest) as proposed by the Special Rapporteur was incorporated in para. 2 of art. 8. Hence the gap in the sequence of articles.

Article 10 bis

Assurances and guarantees of non-repetition

> The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

2. Text of paragraph 2 of draft article 1 and draft articles 6, 6 bis, 7, 8, 10 and 10 bis, with commentaries thereto, provisionally adopted by the Commission at its forty-fifth session

335. The text of paragraph 2 of draft article 1 and draft articles 6, 6 *bis*, 7, 8, 10 and 10 *bis*, with commentaries thereto, provisionally adopted by the Commission at its forty-fifth session are reproduced below.

Article 1

> ...
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> 2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the international wrongful act to perform the obligation it has breached.

Commentary 81/

...

(5) The fact that, as a result of the internationally wrongful act, a new set of relations is established between the author State and the injured State does not mean that the previous relationship disappears *ipso facto*. Even if the author State complies with its secondary obligation, it is not automatically relieved of its duty to perform the obligation it has breached. Paragraph 2 states this rule. It does so in the form of a saving clause to allow for the possibility of exceptions, such as the eventuality that the injured State might waive its right to the continued performance of the obligation.

Article 6

Cessation of wrongful conduct

> A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct without prejudice to the responsibility it has already incurred.

81/ The text of paragraph 1 as provisionally adopted in 1983 is set forth in paragraph 333 above. For the relevant commentary see *Yearbook ... 1983*, vol. II (Part Two), p. 42.

Commentary

(1) Article 6 is the first of a series of articles dealing with the new relations which arise from an international delict between the author State and the injured State. The Commission decided to consider separately the relations which may arise from international crimes under article 19. The present articles are without prejudice of the consequences of crimes. As indicated in paragraph (1) of the commentary to article 1 of Part Two, the new relations referred to above involve, in the first place, new obligations of the author State and corresponding entitlements of the injured State which are dealt with in articles 6 to 10 *bis* and may also include new rights of the injured State or States, such as the right to take countermeasures, which is dealt with in articles 11 to 14, as adopted by the Drafting Committee at the current session.

(2) The new obligations of the author State consist in the redress of the situation resulting from the breach of a primary obligation, i.e. an obligation contained in a primary rule. The most frequently invoked of these new obligations is the obligation to make reparation, dealt with in article 6 *bis*, which may be discharged in various forms as provided in articles 7, 8, 10 and 10 *bis*. A primary exigency in eliminating the consequences of a wrongful act is, however, to ensure cessation of the wrongful act, i.e. discontinuance of the specific conduct which is in violation of the obligation breached.

(3) The importance of cessation is not always clearly perceived for a variety of reasons. In the first place, an injured State will usually demand positive behaviour on the part of the author State such as liberation of persons or restitution of objects and will do so in the context of a broader claim to reparation for injury rather than in terms of cessation. Secondly, whenever resort is had to a third party settlement procedure, such procedure often opens at a time when the commission of the wrongful act (whether instantaneous or more extended in time) has completed its cycle so that the dispute submitted for settlement is circumscribed to the form or forms of reparation due. 82/ Thirdly, even when the parties appear before an international

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82/ This is vividly illustrated by the award rendered in the case concerning the differences between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair (hereafter the *Rainbow Warrior* case) (United Nations, *Reports of International Arbitral Awards*, vol. XX, to be issued).

body at a time when the conduct complained of is still in progress, the claimant State will organize its demands not so much in terms of discontinuance of the wrongful conduct - wrongfulness itself being at that stage controversial - but rather in terms of provisional or conservative measures that the judge may indicate or, possibly, impose upon the allegedly wrongdoing State. 83/ Notwithstanding the noted difficulties of perceptibility of cessation per se, the specific features of the claim to cessation justify the inclusion of a special article on this particular remedy.

(4) In terms of legal theory, cessation may be ascribed either to the continued normal operation of the "primary" rule of which the previous wrongful conduct constitutes a violation or to the operation of the "secondary" rule coming into play as an effect of the occurrence of the wrongful act. The Commission is of the view that the very distinction between primary and secondary rules is a relative one and that cessation is situated, so to speak, "in between" the two categories of rules. With regard to the former, it operates in the sense of concretizing the primary obligation, the infringement of which by the wrongdoing State is in progress. With regard to the latter, it operates in the sense of affecting - without providing directly for reparation - the quality and quantity of reparation itself and the modalities and conditions of the measures to which the injured State or States, or an international institution, may resort in order to secure reparation.

(5) Irrespective of whether, in theoretical terms, cessation falls outside the realm of the legal consequences of a wrongful act stricto sensu, its practical usefulness justifies that it be the subject of a separate provision in the present draft articles. Cessation is of far greater relevance within the international legal system - given the structure of inter-State society and the role of States in the making, modification and abrogation of rules - than within the legal systems of national societies. Its function is to put an end to a violation of international law which is in progress and to safeguard the continued validity and effectiveness of the infringed primary

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83/ For example, in the case concerning United States Diplomatic and Consular Staff in Tehran, the United States asked the International Court of Justice to indicate the immediate release of the hostages, as a provisional measure, and the Court provided accordingly by order of 15 December 1979 (I.C.J. Reports, 1979, p. 7).

rule which may suffer in the long run from the continuation of the violation. The rule on cessation thus protects not only the interest of the injured State or States but also the interests of the international community in the preservation of, and reliance on, the rule of law. It should be recalled in this connection that cessation is the remedy which is most frequently resorted to by organs of international organizations, particularly the General Assembly and the Security Council of the United Nations, in the presence of the most serious breaches of international law.

(6) Another reason for devoting a separate article to cessation is to avoid subjecting cessation to the limitations or exceptions applicable to forms of reparation such as restitutio in integrum. None of the difficulties which may hinder or prevent restitution in kind is such as to affect the obligation to cease the wrongful conduct. This is an inescapable consequence of the fact that the difficulties or impossibility which may partly or totally affect restitution (or any other form of reparation) concern reparative measures which can only follow the accomplished wrongful act, namely the consummated violation of the primary rule. Cessation is not and should not be subject to such supervening conditions because its purpose is precisely to prevent future wrongful conduct, namely conduct that would further extend the wrongful act in time and space. Unless the primary rule itself is modified or ceases to exist and unless the wrongful conduct is condoned at some stage by supervening circumstances that exclude wrongfulness, the obligation to discontinue the wrongful conduct must stand unlimited. Any limitation of such a basic obligation would call into question the binding force of the primary rules themselves and endanger the validity, certainty and effectiveness or international legal relations.

(7) As indicated above, cessation is often considered in more or less close connection with restitution in kind or other forms of reparation. Yet cessation is not part of reparation. It is targeted towards the wrongful conduct per se, irrespective of its consequences. Cessation could be described as future oriented, in other words, implying future compliance with a primary rule of international law, whereas reparation whose function, as defined by the Permanent Court of International Justice, in the Chorzow Factory case, 84/ is to "wipe out all the consequences", for the relations between the author State and the injured State, of the factual and legal

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84/ P.C.I.J., Series A, No. 17, Judgement of 13 September 1928, p. 47.

effects of a violation of an international obligation of the former vis-à-vis the latter is oriented towards a past infringement of the primary rule.

(8) The difficulty in isolating cessation from reparation is compounded by the fact that in practice the result of cessation may be indistinguishable from that of one specific form of reparation, namely restitution in kind. Reference is made here to cases involving the liberation of persons or the restitution of objects or premises. Such measures are often cited as examples of reparation in the form of restitution in kind. In fact, they aim at stopping the breach. What is demanded is the return to the attitude required by law, the cessation of the wrongful conduct. Indeed, the situations in which actions such as those referred to have been claimed and eventually carried out belong to the category of wrongful acts having a continuing character which are still in progress at the moment at which the injured State claims one or more remedies. It follows that the actions claimed seem to respond to a problem of cessation. It should be stressed, however, that this does not exclude the possibility that the same action may at the same time also constitute reparation in kind. In the case, for instance, of an object illegally detained, restitution in kind consists in the giving back of the object to its legitimate owner but such a measure, surely a matter of reparation, also includes cessation of the wrongful act. 85/ The presence of cessation per se - as a distinct remedy to a continuing violation - is even more evident in cases of wrongful detention of nationals of the injured State. The fact that detained entities are human beings, injured by their unlawful treatment in their physical and psychic integrity, in their personal liberty and dignity (in addition to their mere economic, productive activity) makes

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85/ Of significance, in that respect, is the claim of Greece in the Forests in Central Rhodopia case. The forests having been annexed by Bulgaria, Greece claimed rights of ownership and use acquired prior to the annexation, which it considered to be as unlawful as the possession of the forests. However, the Greek claim was formulated not in terms of a return to the original lawful situation but in terms of restitutio in integrum, namely as a form of reparation (United Nations Reports of International Arbitral Awards, vol. III, p. 1407).

their release morally and legally more evidently an urgent question of cessation of the violation. This exigency prevails in a sense over any form of reparation. 86/

(9) In a factual sense, cessation is a normal stage of any wrongful act, whatever its duration. It is obvious, however, that the only hypothesis under which cessation presents an interest that goes beyond the dynamics of the wrongful act is the case of a wrongful act having a continuing character.

(10) The Commission considered the definition of a wrongful act having a continuing character in connection with article 18, paragraph 3, and articles 25 and 26 of Part One. Instances of a continuing wrongful act are provided in paragraph (21) of the commentary to article 18 as follows:

> "The maintenance in force of a law which the State is internationally required to repeal or, conversely, failure to pass a law which it is internationally required to enact; unjustified occupation of a territory of another State; unlawful blockade of foreign coasts or ports, etc."

In the same context, the Commission also referred to the de Becker case in which the European Commission on Human Rights held that the loss of the right to work as a journalist as a result of a judgement which had preceded the entry into force of the European Convention on Human Rights constituted a continuing violation with respect to which the claimant rightly considered himself to be the victim of a violation of his freedom of expression under article 10 of the Convention. The European Commission on Human Rights declared the application admissible to the extent to which the situation complained of continued to exist in the period subsequent to the entry into force of the Convention. A more recent example is that of the Vermeire

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86/ The predominant exigency of cessation over that of reparation in the case of wrongful apprehension, detention or imprisonment of human beings seems to emerge clearly in the United States Diplomatic and Consular Staff in Tehran case, the International Court of Justice, after declaring that the conduct of Iran constituted a continuing wrongful act at the time of application, decided that the Government of that State

> "must immediately terminate the unlawful detention of ... United States nationals now held hostage in Iran, and must immediately release each and everyone and entrust them to the protecting Power ..."

(I.C.J. Reports, 1980, pp. 44-45).

case, 87/ in which the European Court of Human Rights stated that by virtue of its former Marckx judgement, 88/ Belgium had been under an obligation to repeal the laws discriminating against children born out of wedlock.

(11) An illustration of the duty of cessation is also provided by the procedure under Article 169 of the Treaty Establishing the European Economic Community. Under this procedure, the Court of Justice of the European Community can make findings that a State has breached its obligations under the Treaty. In most cases, the Court has to pronounce itself on national legislation allegedly contrary to a rule of Community law. If a finding of inconsistency is made by the Court, this implies the duty for the defendant State to repeal the legislative act concerned. 89/

(12) The example of wrongful non-enactment or non-abrogation of internal legislation referred to by the Commission has also been cited in doctrine. 90/ Other examples mentioned by writers include the arrest of a diplomat.

87/ Judgement of 29 November 1991, Publications of the European Court of Human Rights, Series A: Judgements and Decisions, vol. 214-C, p. 76, at pp. 82-83.

88/ Judgement of 13 June 1979, ibid., vol. 31.

89/ For a detailed discussion, see G. Bebr, Development of Judicial Control of the European Communities (Nijhoff, The Hague/Boston/London, 1981) pp. 278 et seq.; and H. G. Schermers/D. Waelbroeck, Judicial Protection in the European Communities (5th ed.) (Kluwer, Deventer/Boston, 1992, pp. 279 et seq.)

90/ According to Triepel, "if at a given moment, States are under an international obligation to have rules of law of a specific content, the State which already has such rules is failing in its duty if it abolishes them and does not reinstate them whereas a State which does not yet have such rules is failing in its duty simply by not instituting them but both States are committing ... a 'völkerrechtliches Dauerdelikt'" (H. Triepel, Völkerrecht und Landesrecht (Leipzig, 1899, p. 289)).

Ago specifies for his part that "the basic element of the distinction" between instantaneous and continuing wrongful acts "lies in the instantaneous or permanent nature of the action", so that one could distinguish between "wrongful acts in which the objective elements of a conduct that conflicted with one of the State's international obligations is immediate in nature" and "other violations of an international obligation which have a continuing character, the result being that when they become complete with all their constituent elements realized, they do not thereby cease to exist; rather they continue in identical form and become permanent (R. Ago, "Le délit international", Recueil des Cours de l'Académie de droit international de La Haye, 1939-II (Paris, Sirey, 1947), vol. 68, pp. 519-521).

(13) Closely connected with the condition of the continuing character of the wrongful act is the condition that the violated rule is still in force at the time when cessation is sought. In this connection, the Arbitral Tribunal in the Rainbow Warrior case stated the following:

> "The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.
>
> "Obviously, a breach ceases to have a continuing character as soon as the violated rule ceases to be in force.
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> "The recent jurisprudence of the International Court of Justice confirms that an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued. (The United States Diplomatic and Consular Staff in Teheran Case, I.C.J. Reports, 1979, p. 21, paras. 38 to 41, and ibid., 1980, para. 95, No. 1; The Case Concerning Military and Paramilitary Activities in and Against Nicaragua, I.C.J. Reports, 1984, p. 187, and ibid., 1986, para. 292, p. 149).
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> "If, on the contrary, the violated primary obligation is no longer in force, naturally an order for the cessation or discontinuance of the wrongful conduct would serve no useful purpose and cannot be issued." 91/

(14) With regard to the timing of any claim for cessation on the part of the injured State or States, it is obvious that no such claim could be lawfully put forward unless the wrongful conduct had begun, namely unless the threshold of unlawfulness had been crossed by an allegedly wrongdoing State's conduct. A distinction should particularly be drawn between a State's conduct that "completes" a wrongful act (whether instantaneous or extended in time) and the State's conduct that precedes such conduct and does not qualify as a wrongful act. It should also be taken into consideration, on the other hand, that, unlike wrongful acts of national law, the internationally wrongful act of a State is quite often - and probably in most cases - the result of a concatenation of a number of individual actions or omissions which, however legally distinct in terms of municipal law, constitutes one compact whole so

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91/ Loc. cit. (note 82 above).

to speak from the point of view of international law. In particular, a legislative act whose provisions might open the way to the commission by a State of a wrongful act may not actually lead to such a result because it is not followed by the administrative or judicial action "ordered by the legislator". Conversely, a legislative act which would *per se* be in conformity with the necessity of ensuring compliance by a State with its international obligations might prove insufficient because it is not (or is wrongly) applied by administrative or judicial organs. This complexity of most internationally wrongful acts is particularly obvious in the frequently occurring cases in which the initial steps leading to the commission of a wrongful act by a State are represented by an act of a private party or an act of subordinate organs, further steps by State organs being indispensable for an internationally wrongful act to be "perfect". 92/ This suggests that if it is true that a claim for cessation is admissible as a matter of right (or *faculté*) only from the moment at which the conduct of the author State has attained the threshold prior to which it is not, and after which it became, a wrongful act, situations are conceivable in which an initiative of the prospectively injured State might be considered useful and not unlawful. Indeed, in the presence of conduct of another State which manifestly appears to constitute the initial phase of a course of action (or omission) likely to lead to a wrongful act, the State could, with all the necessary precaution, take the appropriate steps, with due respect for the principle of non-intervention in the other party's domestic affairs, to suggest in an amicable manner an adjustment of the former State's conduct which might avert liability.

(15) Unlike subsequent articles on reparation, article 6 provides for an obligation of the wrongdoing State, in keeping with the Commission's view that cessation is not a form of reparation but rather the object of an obligation stemming from the combination of wrongful conduct in progress and the normative strength of the primary rule of which the wrongful conduct is held in breach. Whereas, as far as the various forms of reparation are concerned,

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92/ As regards the notion of the "complexity" and "unity" of an internationally wrongful act and, more generally, the notion that a unit of State conduct under international law (action, commission or act of will) is a "factually complex unit" from the point of view of international law, see G. Arangio-Ruiz, "L'Etat dans le sens du droit des gens et la notion du droit international", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. 26, Nos. 3-4 (May 1975), pp. 311-331.

the preference for a formulation in terms of rights of the injured State is justified in view of the fact that it is by decision of the injured State that a secondary set of legal relations is set in motion, the situation is different with regard to cessation where, although an initiative on the part of the injured State is both lawful and opportune, the obligation to discontinue the wrongful conduct is to be considered not only existent but in actual operation on the mere strength of the primary rule, quite independently of any representation or claim on the part of the injured State. Article 6 therefore emphasizes the continued, unconditional subjection of the author State to the primary obligation, no claim to respect thereof by the injured State being necessary. It reflects the Commission's view that subjecting the obligation of cessation to a claim by an injured State which may not be in a position to make such a claim or may be under pressure not to make it would frustrate one of the main functions of cessation, namely securing the discontinuance of a violation of international law which may entail, in addition to obvious direct and specific consequences to the detriment of the injured State, a threat to the very rule infringed by the wrongdoer's unlawful conduct. Given the inorganic structure of inter-State society, the norms of international law developed by States themselves are vulnerable, being exposed to destruction as a result of breaches of those norms by States. The significance of cessation of a wrongful act goes beyond the level of bilateral relations to the level of relations between wrongdoers and all the other States and members of the international community.

(16) In keeping with article 3 of Part One entitled "Elements of an internationally wrongful act of a State", the term "conduct" covers both commissive and omissive wrongful conduct. In the case of commissive wrongful conduct, cessation will consist of the negative obligation to "cease to do" or "to do no longer". In the case of omissive wrongful conduct, cessation will cover the author State's undischarged obligation "to do" or "to do in a certain way". The Commission is aware that the dual sense it thus attributes to the expression "cessation" is not universally accepted in international theory and that, in practice, States will rather demand specific performance of a breached obligation than cessation of non-compliance with an obligation to do. However, omissive wrongful acts may well fall as well as, and perhaps more frequently than, commissive wrongful acts in the category of wrongful acts having a continuing character. As observed by the arbitral tribunal in the Rainbow Warrior case, cessation is relevant to all unlawful acts extending

in time "regardless of whether the conduct of State is an action or an omission ... since there may be cessation consisting in abstaining from certain actions - such as supporting the 'contras' - or consisting in positive conduct such as releasing the United States hostages in Tehran". 93/ As long as it is protracted beyond the date within which such an obligation is due to be performed, non-compliance with an "obligation to do" is a wrongful act of a continuing character to which cessation should be applicable in isolation as well as in conjunction with one or more of the forms of reparation, and particularly with restitution in kind.

(17) The concluding phrase of the article "without prejudice to the responsibility it has already incurred" makes it clear that compliance with the obligation of cessation in no way exonerates the wrongdoing State from the responsibility it has incurred as a result of the wrongful act prior to such compliance. Cessation does not cancel the legal or factual consequences of the wrongful act. Its target is the wrongful act per se. It consists, so to speak, in the draining of the source of responsibility to the extent that it has not yet, as it were, operated. As such, cessation does not affect the consequences - legal or factual - of the past wrongful conduct.

Article 6 bis

Reparation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, as provided in articles 7, 8, 10 and 10 bis, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

(a) the injured State; or

(b) a national of that State on whose behalf the claim is brought

which contributed to the damage.

3. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

93/ Loc. cit. (note 82, above).

Commentary 94/

(1) A State discharges the responsibility incumbent on it for breach of an international obligation by making good, that is to say, by making reparation for the injury caused.

(2) The word "reparation" is the generic term which describes the various methods available to a State for discharging, or releasing itself from, such responsibility. This term, employed in Article 36, paragraph 2 of the Statute of the International Court of Justice, appears also in the PCIJ's formulation of the basic rules on the subject, as contained in the judgment rendered in the Chorzow Factory case: 95/

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form (PCIJ Ser. A, No. 9, p. 21). The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular, by the decisions of arbitral tribunals - is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."

In keeping with the above pronouncement of the Permanent Court, article 6 bis lays down the general rule that full reparation should be provided so as to wipe out, to the extent possible, all the consequences of the internationally wrongful act.

(3) In the Chorzow Factory case, material damage had been sustained and the Court therefore singled out only two methods of reparation, namely "restitution in kind, or, if that is not possible payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it". There are however other methods of reparation which are appropriate to injuries of a non-material nature, namely satisfaction and assurances or guarantees of non-repetition.

94/ The possible implications for the provisions on reparation of the existence of a plurality of injured States, including the question of the so-called differently or indirectly injured States, will be considered at a later stage.

95/ P.C.I.J., Series A, No. 17, p. 47.

Article 6 bis accordingly provides that reparation may consist in restitution in kind, compensation, satisfaction and assurances or guarantees of non-repetition.

(4) Unlike article 6 which is couched in terms of an obligation for the reasons explained in paragraph (15) of the commentary thereto, the present article provides for a right for the injured State, taking into account the fact that it is by a decision of the injured State that the process of implementing this right in its different forms is set in motion.

(5) The phrase "as provided in articles 7, 8, 10 and 10 bis, either singly or in combination" makes it clear that the forms of reparation dealt with in those articles are, on the one hand, available to the injured State in accordance with and subject to the conditions laid down in the corresponding articles and, on the other hand, susceptible of combined application. Paragraph 1 of article 6 bis should therefore be interpreted in the light of the provisions dealing with each of the forms of reparation identified in the article.

(6) Under paragraph 1, a State which commits an internationally wrongful act is under an obligation to provide full reparation for the injury sustained as a result of the internationally wrongful act. The injury may however be the result of concomitant factors among which the wrongful act plays a decisive but not an exclusive role. In such cases, to hold the author State liable for reparation of all of the injury would be neither equitable nor in conformity with the proper application of the causal link theory - an issue which is extensively dealt with in the commentary to article 8.

(7) Paragraph 2 singles out the negligence or the wilful act or omission of the injured State which contributed to the damage (subparagraph (a)) and the negligence or the wilful act or omission of a national of the injured State on whose behalf the claim is brought (subparagraph (b)) which contributed to the damage. States may bring claims on behalf of their nationals, namely national or juridical persons, both of which are covered by the term "national". This factor is widely recognized both in doctrine and in practice as relevant to

the determination of reparation. 96/ In practice, it is in the assessment of pecuniary compensation that the relevance of the negligence or wilful conduct of the injured State or of a national of the injured State on whose behalf the claim is brought has been recognized and acted upon. 97/ However, the factor in question can also be relevant in the case of other forms of reparation. If, for example, a State-owned ship is unlawfully seized by another State and while it is seized, sustains damage attributable to the negligence of the captain, the author State may be required merely to return the ship in its damaged condition. Negligence or wilful conduct can similarly be relevant to certain forms of satisfaction. The Commission has therefore deemed it appropriate to provide for the role of negligence or wilful conduct in the context of article 6 bis. The formulation it has adopted to that end

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96/ See, for example, G. Salvioli, La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux, in Recueil des Cours ..., 1929-III, p. 265-266; C. Čepelka, Les conséquences juridiques du délit en droit international contemporain, Prague, 1965, p. 32; B. Graefrath, Responsibility and Damage Caused, in Recueil des Cours ..., 1984-II, p. 95; and B. Bollecker - Stern, Le préjudice dans la théorie de la responsabilité internationale, Paris, 1973, chap. III, p. 265-300.

97/ In the Delagoa Bay Railway case, the arbitrators were asked to settle a claim in the dispute between Portugal on the one hand, and the United Kingdom and the United States of America on the other, over the cancellation of the franchise for a railway, 35 years before its expiry date: "All the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant ... a reduction in reparation." (La Fontaine, Pasicrisie internationale, Berne, 1902, p. 365).

In the Wimbledon case (P.C.I.J. Series A, No. 1, p. 31), the refusal to let the ship sail through the Kiel Canal having been found to be a source of liability, there remained to determine the amount of compensation. There was no doubt about the offending State's obligation to pay damages for the detour to which the ship had been forced as a consequence. A doubt, however, arose with regard to the injury represented by the fact that the ship had harboured at Kiel for some time, following refusal of passage, before taking an alternative course. Implicitly, the Court admitted that the ship captain's conduct in this respect had to be considered as a possible circumstance affecting the amount of compensation. While thus confirming the rule with its authority, the Court did not believe however that the captain's conduct left anything to be desired. Indeed, the Court stated:

> "As regards the number of days, it appears to be clear that the vessel, in order to obtain recognition of its right, was justified in awaiting for a reasonable time the result of the diplomatic negotiations entered into on the subject, before continuing its voyage".

Other examples are to be found in C.D. Gray, Judical Remedies in International Law, Oxford, 1987, p. 23.

in paragraph 2 of the article is fully consonant with the principle that full reparation is due for the whole damage - but nothing more than the damage - ascribable to the wrongful act. The phrase "the negligence or the wilful act or omission ... which contributed to the damage" is borrowed from article VI, paragraph 1, of the Convention on International Liability for Damage caused by Space Objects. Subparagraph (b) of paragraph 2 provides for the case where negligence or a wilful act or omission of a national of the injured State on whose behalf the claim is brought has contributed to the damage. Such a circumstance should affect the amount of the reparation which the injured State is entitled to, the underlying idea being that the position of a State which espouses a claim must not be more favourable than would the position of its national if he could bring the case himself.

(8) There may be other equitable considerations that might be taken into account in providing full reparation, particularly in cases involving an author State with limited financial resources, but only to the extent that such considerations can be reconciled with the principle of the equality of all States before the law and the corresponding equality of the legal obligations of all States.

(9) In substance, paragraph 3 states the general principle that the State which has committed an internationally wrongful act could not invoke its internal law as justification for failure to provide reparation. The wording of this paragraph is modelled on article 27 of the Vienna Convention on the Law of Treaties. The concept of reparation should be understood in the light of paragraph 1 relating to the right of the injured State to obtain full reparation.

(10) Paragraph 3 deals with the impact of internal law on the obligation of the State which has committed an internationally wrongful act to make reparation. Although, it has usually been in response to claims of restitution in kind that States have invoked their internal law as a defence, the question may arise in relation to other forms of reparation and is therefore covered in the present article.

(11) It should first be pointed out that paragraph 3 is strictly concerned with municipal law obstacles. The question of juridical impossibility deriving from international law itself is relevant to restitution in kind and is accordingly dealt with in article 7. One is confronted here with the problem of conflict between two incompatible exigencies: (a) the principle that a State cannot escape its international obligations by invoking rules of

its own legal system (article 4 of Part One of the draft articles); and (b) the factual difficulty which the Government of the other State faces when confronted with an obstacle in the rules of the internal legal system under which it is bound to operate.

(12) Although it is not unanimously shared, 98/ the prevailing doctrinal view 99/ is that the difficulties which a State may encounter within its

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98/ See, *e.g.*, *M.B. Alvarez de Eulate*, "*La restitutio in integrum en la practica y la jurisprudencia internacionales*", *Anuario Hispano - Luso - Americano de Derecho International* (Madrid), vol. 4 (1973), p. 269; K. Zemanek, "Die völkerrechtliche Verantwortlichkeit und die Sanktionen des Völkerrechts", *Österreichisches Handbuch des Völkerrechts*, H. Neuhold, W. Hummer and C. Schreuer, eds. (Vienna, Manz, 1983), vol. I, p. 378; H. Urbanek, "Die Unrechtsfolgen bei einem völkerrechtsverletzenden nationalen Urteil; seine Behandlung durch internationale Gerichte", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. 11, No. 1 (1961), pp. 70 *et seq*.

99/ See, *e.g.*, D. Anzilotti, *Cours de droit international*, French transl. of 3rd Italian ed. by G. Gidel (Paris, Sirey, 1929, p. 524); C. de Visscher, "Le déni de justice en droit international", *Recueil des Cours* ..., 1935 - II (Paris, Sirey, 1936), vol. 52, pp. 436-437; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, Sirey, 1939), p. 83; and G. Morelli, who writes

> "An impossibility which stems from the municipal law of the State which has committed the unlawful act is not in that respect relevant under general international law" (*Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 359).

See also G. Ténékidès, "Responsabilité internationale", in Dalloz, *Répertoire du droit international* (Paris, 1969), vol. II, p. 790; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts*, F. Stier-Stomlo ed. (Stuttgart, Kohlhammer, 1920), vol. III, 1st part, pp. 209-210; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 510; F. Berber, *Lehrbuch des Völkerrechts* (München, C.H. Beck, 1977), vol. III, 2nd rev. ed., p. 25; and B. Graefrath, op. cit. (note 96 above), p. 78.

Mention should also be made of some draft articles codifying the rules governing international responsibility prepared by international legal organizations or conferences, among which the draft code of international law prepared in 1926 by the Japanese branch of the International Law Association (art. 5) (reproduced in *Yearbook ... 1969*, vol. II, p. 14, document A/CN.4/217 and Add.1, annex II); the draft articles on the responsibility of States for damage done in their territory to the person or property of foreigners, prepared by the Harvard Law School in 1926 (art. 2) (reproduced in *Yearbook ... 1956*, vol. II, p. 229, document A/CN.4/96, annex 9); the draft articles on the responsibility of States for damage caused in their territory to the person or property of foreigners adopted on first reading by the Third Committee of the 1930 Conference for the Codification of International Law own legal system in discharging an international obligation in its relations with one or more other States are (at least *per se*) not decisive as a legal justification for failure to discharge such an obligation. In the view of the Commission, this general principle, universally accepted with regard to international obligations deriving from the primary rules, is equally applicable with regard to international obligations deriving from secondary rules. This view finds support in the fact that States have recourse to conventional law in order to exclude, modify or restrict the functioning of reparation in the cases where a specific remedy might give rise to difficulties of a certain magnitude for the other State. Of particular significance in this respect are article 32 of the Revised General Act on the Pacific Settlement of Disputes of 28 April 1949, 100/ article 50 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms 101/ and article 30 of the 1957 European Convention for the Peaceful Settlement of Disputes. 102/ These provisions permit the Contracting States to reject the claim for reparation if it conflicts with their constitutional law or limit claims for reparation to those which can be satisfied through the administrative channel. 103/ The fact that States deem it necessary expressly to agree in order to prevent restitution measures from gravely affecting fundamental principles of municipal law seems to indicate that they believe that at the level of general international law a correct discharge of the author State's obligation must prevail over legal obstacles.

(art. 5) (League of Nations, doc. C.351 (*c*) M. 145 (*c*). 1930.V, *idem*, p. 225, annex 3); and the draft convention on the responsibility of States for injuries caused in their territory to the person or property of aliens prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht (art. 9, para. 2) (reproduced in *Yearbook ... 1969*, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII).

100/ United Nations, *Treaty Series*, vol. 71, p. 101.

101/ Ibid., vol. 213, p. 221.

102/ Ibid., vol. 320, p. 243.

103/ P.A. Bissonnette "*La satisfaction comme mode de réparation en droit international*" (thesis, University of Geneva) (Annemasse, Impr. Grandchamp, 1952), p. 20, such provisions being "clearly intended to protect the internal legal system from outside interference" (B. Graefrath, op. cit., (note 96 above), p. 78).

(13) The above conclusion finds support in the practice of States and international decisions. An example of this is the dispute between Japan and the United States (1906) over the discriminatory policies of the Administration of California with regard to the availability of education institutions for children of Asiatic origin, a dispute that was settled in favour of the Japanese claim by the revision of the California legislation. 104/ Another instance is the *Article 61 (2) of the Weimar Constitution* case 105/ wherein no less than a constitutional amendment was provided for in order to ensure the full discharge of the obligation deriving from article 80 of the Treaty of Versailles. Mention may also be made of the *Crenner-Erkens* case (1961) 106/ in which two Belgian diplomats were arrested and detained by the Katanga police and later expelled. The orders of expulsion were annulled following representations from the Vice-Dean of the Diplomatic Corps in Leopoldville. Also of relevance are the *Peter Pázmány University* 107/ and *Legal Status of Eastern Greenland* cases. 108/ In the former, the PCIJ specified that the property to be returned should be "freed from any measure of transfer, compulsory administration, or sequestration". In the latter case, it was decided that the declaration of occupation promulgated by the Norwegian Government on 10 July 1931 and any steps taken in that respect by the Norwegian Government constituted a violation of the existing legal situation and were accordingly unlawful and invalid.

(14) It is true that in a number of cases, arbitral tribunals have taken into account the internal situation of the wrongdoing State to deny a specific form

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104/ See R.L. Buell "The development of the anti-Japanese agitation in the United States", *Political Science Quarterly*, New York, vol. 37 (1922), pp. 620 *et seq*.

105/ See *British and Foreign State Papers, 1919*, vol. 112, p. 1094.

106/ *Revue générale de droit international public* (Paris), vol. 65, 1961, p. 813.

107/ *Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (The *Peter Pázmány University*), judgment of 15 December 1933, *P.C.I.J., Series A/B*, No. 61, p. 208.

108/ *P.C.I.J., Series A/B*, No. 53, judgment of 5 April 1933, p. 22.

of reparation. Thus, in the Walter Fletcher Smith case, 109/ the arbitrator, while maintaining that restitution should not be considered inappropriate, pronounced himself in "the best interests of the parties and of the public" for compensation. Similarly, in the Greek Telephone Company case (1935) 110/ the arbitral tribunal, while ordering restitutio, asserted that the author State could provide compensation instead "for important State reasons". Indemnification was also accepted in lieu of restitutio originally decided in the Mélanie Lachenal case, 111/ the Franco-Italian Conciliation Commission having agreed that restitutio would require difficult internal procedures. More recently, the parties in the Aminoil case 112/ agreed that restoration of the status quo ante following the annulment of the concession by Kuwaiti decree would be impracticable in any event. The Commission would however tend to view those decisions as based on excessive onerousness or lack of proportion between the injury caused and the burden represented by a specific form of reparation rather than on obstacles deriving from municipal law.

(15) It is undeniable that the legal system of a State which is bound up in close interaction with the political, economic and social regime of the nation may frequently be of relevance to the effective application of specific forms of reparation. Nevertheless, this should not be taken to mean that general international law recognizes any form of reparation as subject to the municipal legal systems of the author State and to the exigencies that such a system is intended to satisfy. Any State which is well aware of its international obligations - secondary as well as primary - is bound to see to it that its legal system, not being opposable to the application of international legal rules, is adapted or adaptable to any exigencies deriving

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109/ United Nations, Reports of International Arbitral Awards, vol. II, p. 918.

110/ See J.G. Welter and S.M. Schwebel, "Some little known cases on concessions", The British Year Book of International Law, 1964, vol. 40, p. 216, at p. 221.

111/ Decision No. 172 of the Conciliation Commission of 7 July 1954 (United Nations, Reports of International Arbitral Awards, vol. XIII, pp. 130-131).

112/ Arbitration between Kuwait and the American Independent Oil Company (Aminoil); see International Legal Materials (Washington, D.C.), vol. 21 (1982), p. 982, p. 976 and p. 979.

from such rules. Of course, a State is entitled to preserve its political, economic or social system from any unlawful attempt against its sovereignty or domestic jurisdiction on the part of other States. Nevertheless, it cannot as well feel also entitled to oppose its _interna corporis_ as legal obstacles to the fulfilment of an international obligation to provide a specific form of reparation. The juridical obstacles of municipal law are, strictly speaking, factual obstacles from the point of view of international law. Hence they should not be treated as strictly legal obstacles in the same sense as obstacles deriving from international legal rules.

(16) The exceptions to the injured State's right to obtain restitution in kind, set forth in subparagraphs (b), (c) and (d) of article 7, may also be relevant with respect to other forms of reparation listed in article 6 _bis_.

Article 7

Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation that existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) is not materially impossible;

(b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Commentary

(1) Restitution in kind is the first of the methods of reparation available to a State injured by an internationally wrongful act.

(2) The concept is not uniformly defined. According to one definition, restitution in kind would consist in re-establishing the _status quo ante_, namely the situation that existed prior to the occurrence of the wrongful act,

in order to bring the parties' relationship back to its original state. 113/ Under another definition, restitution in kind is the establishment or re-establishment of the situation that would exist, or would have existed if the wrongful act had not been committed. 114/ The former definition views restitution in kind *stricto sensu* and *per se* and leaves outside the concept of the compensation which may be due to the injured party for the loss suffered during the period elapsed during the completion of the wrongful act and thereafter until the time when the remedial action is taken. The latter definition, on the other hand, absorbs into the concept of restitution in kind not just the re-establishment of the *status quo ante* (*restitutio in pristinum*), but also the integrative compensation. As appears from the definition in the opening paragraph of article 7, the Commission has opted for the purely restitutive concept of restitution in kind which, aside from being the most widely accepted in doctrine, has the advantage of being confined to the assessment of a factual situation involving no theoretical reconstruction of what the situation would have been if the wrongful act had not been committed. It has done so bearing in mind that, under paragraph 1 of article 6 *bis*, the injured State is in any event entitled to "full reparation" for the injury sustained as a result of an internationally wrongful act and that, as made clear by the phrase "either singly or in combination" in paragraph 1 of the same article, restitution in kind and compensation are susceptible of combined application. In other words, the Commission considers that restitution should be limited to restoration of the *status quo ante* (which can be clearly determined), without prejudice to possible compensation of *lucrum cessans*.

113/ Authors favouring this definition include C. de Visscher, "La responsabilité des Etats", *Biblioteca Visseriana* (Leyden, 1924), vol. II, p. 118; P.A. Bissonnette, op. cit. (note 103 above) p. 20; A. Verdross, *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 399; K. Zemanek, "La responsabilité des Etats pour faits internationaux illicites ainsi que pour faits internationaux licites", *Responsabilité internationale* (Paris, Pedone, 1987), p. 68; and K. Nagy, "The problem of reparation in international law", *Questions of International Law: Hungarian Perspectives*, H. Bokor-Szego ed. (Budapest, Akadémiai Kiadó, 1986), vol. 3, p. 178.

114/ This definition is endorsed by, *inter alia*, D. Anzilotti op. cit. (note 99 above), p. 524; E. Jimenez de Arechaga, "International Responsibility" in *Manual of Public International Law*, Max Sorensen ed. (London and Basingstoke, The Macmillan Press Ltd., 1968), p. 565 and B. Graefrath, op. cit. (note 96 above), p. 77.

(3) Restitution in kind is the form of reparation which most closely conforms to the general principle of the law of responsibility according to which the author State is bound to "wipe out" all the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed; as such it comes foremost before any other form of reparation lato sensu and particularly before reparation by equivalent. 115/ The logical and temporal primacy of restitution in kind is confirmed first of all by practice, not only by the application of the rule by the PCIJ in the Chorzów Factory case 116/ but also in the cases in which States or arbitral bodies have moved to reparation by equivalent only after the more or less explicit constat that, for one reason or another,

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115/ Along those lines, see J. Personnaz, op. cit. (note 99 above), p. 83; P. Reuter, "Principes de droit international public", Recueil des cours ... 1961-II (Leyden, Sijthoff, 1962), p. 596; G. Ténékidés, op. cit. (note 99 above) p. 790, para. 82; K. Nagy, op. cit. (note 113 above), p. 173; H. Lauterpacht, Private Law Sources and Analogies of International Law (London, Longmans, Green, 1927), p. 149; P.A. Bissonnette, op. cit. (note 103 above), p. 19; G. Schwarzenberger, International Law, 3rd ed. (London, Stevens, 1957) pp. 656 and 657; E. Jimenez de Arechaga, op. cit. (note 114 above), p. 567; B. Graefrath, op. cit. (note 96 above), p. 77; M.B. Alvarez de Eulate, op. cit. (note 98 above) p. 283; G. Dahm, Völkerrecht (Stuttgart, Kohlhammer, 1961), vol. III, p. 233.

116/ With regard to this factory, the Court decided that the author State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible", and that "the impossibility, on which the Parties are agreed, of restoring the Chorzow factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution" (P.C.I.J., Series A, No. 17, p. 48).

Mention must be made, however, of a different jurisprudential tendency which denies any primacy or priority to naturalis reparation. Reference is made to the decision of the Permanent Court of Arbitration of 11 November 1912 in the Russian Indemnity case in which the court, as Jimenez de Arechaga puts it, "attempted to limit redress for breaches of international law to monetary compensation" (op. cit. (note 114 above), p. 566), stating that:

> "all State responsibility whatever its origin is finally valued in money and transferred into an obligation to pay; it all ends or can end, in the last analysis, in a money debt" (United Nations, Reports of International Arbitral Awards, vol. XI, p. 441).

As it pre-dates the Chorzow Factory case, this dictum could be considered as set aside by the PCIJ in the latter decision.

restitutio could not be effected. 117/ Secondly and most importantly, the primacy of restitution in kind is confirmed by the attitudes of the parties. However conscious of the difficulties restitution in kind may encounter, and at times of the improbability of obtaining reparation in such form, they have often insisted upon claiming it as a matter of preference over reparation by equivalent. 118/ This being said, it would be theoretically and practically inaccurate to define restitution in kind as the unconditionally or invariably ideal or most suitable form of reparation to be resorted to in any case and under any circumstances. The most suitable remedy can only be determined in each instance with a view to achieving the most complete possible satisfaction of the injured State's interest in the "wiping out" of all the injurious consequences of the wrongful act, in full respect, of course, of the rights of the author State. It is a rather frequent occurrence that the parties agree, or the injured State chooses, to substitute compensation, totally or in part, for restitution in kind. There is however

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117/ See in this regard the following cases: British claims in the Spanish zone of Morocco, decision of 1 May 1925 (United Nations, Reports of International Arbitral Awards, vol. II, pp. 621-625 and 651-742); Religious Property expropriated by Portugal, decision of 4 September 1920 (ibid., vol. I, pp. 7 et seq.; Walter Fletcher Smith (ibid., vol. II, p. 918); Heirs of Lebas de Courmont, decision No 213 of 21 June 1957 of the Franco-Italian Conciliation Commission (ibid., vol. XIII, p. 764).

118/ One may recall the initial claim of Germany in the Chorzów Factory case (P.C.I.J., Series A, No. 9, judgment of 26 July 1927); the claim of Greece in the Forests in Central Rhodopia case (United Nations, Reports of International Arbitral Awards, vol. III, p. 1407); the United Kingdom claim in the Mexican Oil Expropriation case (see B.A. Wortley, "The Mexican oil dispute 1938-1946", The Grotius Society: Transactions for the Year 1957 (London), vol. 43, p.27); the United Kingdom request, in the Anglo-Iranian Oil Co. case, for annulment of the nationalization of the company and for its restoration "to the position as it existed prior to the ... Oil Nationalization Act" of 1 May 1951 (I.C.J. Pleadings, Anglo-Iranian Oil Co. Case, p. 124); and the claim of Belgium in the Barcelona Traction case, to the effect that the author State should be bound, "in principle and in the first instance, to wipe out the consequences of the unlawful activities of its authorities by restoring the status quo ante (restitutio in integrum)" (I.C.J. Pleadings, Barcelona Traction, Light and Power Company, Limited (New application: 1962), vol. I, p. 183, para. 373).

Also of significance, although they did not emanate from States, are the claims against the Government of Libya on the part of nationalized foreign companies for the annulment of nationalization measures and the re-establishment of the pre-existing situation.

no contradiction between acknowledging that reparation by equivalent is the most frequent form of reparation, on the one hand, and recognizing at the same time that restitution in kind, rightly indicated as naturalis restitutio, is the very first remedy to be sought with a view to re-establishing the original situation or the situation that would exist if the violation had not intervened. The flexibility with which restitution in kind must be envisaged in its relationship with the other forms of reparation is in no sense in contrast with the primacy that befits this remedy as a consequence of its most direct or immediate derivation from the fundamental principle recalled above.

(4) Concern for flexibility underlies the formulation of the opening paragraph of article 7 which is couched in terms of an entitlement of the injured State and makes the discharge of the duty of restitution in kind conditional upon a corresponding claim on the part of the injured State.

(5) The relationship of this duty to the original, primary obligation of the author State and the corresponding original right of the injured State is a matter of some controversy. According to one doctrine, the obligation of restitution in kind would not so much be one of the modes of reparation - and as such one of the facets of the new relationship coming into being as a consequence of a wrongful act - as a continuing "effect" of the original legal relationship. 119/ The majority

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119/ Put forward originally by G. Balladore Pallieri (Gli effecti dell'atto illecito internazionale, Rivista di Diritto Publico (Rome), Series II, 23rd year, 1st part (1931), pp. 64 et seq.), this view seems to have been taken up recently by C. Dominicé ("Observations sur les droits de l'Etat victime d'un fait internationalement illicite" in Droit international 2 (Paris, Pedone, 1982), pp. 25-31). Both authors believe restitutio in integrum to differ from the various forms or modes generally ascribed to reparation in a wide sense; and the difference would consist in the fact that, while pecuniary compensation (dommages-intérêts) and satisfaction would respond to the exigencies of the new situation represented by the material or moral injury suffered by the injured State - a situation not covered by the original legal relationship affected by the wrongful act - restitutio in integrum would continue to respond to the original legal relationship as it existed, in terms of a right on one side and an obligation on the other, prior to the occurrence of the wrongful act, such original relationship surviving intact (without novation or alteration) the commission of the violation.

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ships 123/ or other types of property 124/ including documents, works of art or even sums of money. 125/ The term "juridical restitution" is

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123/ An example is the "Giaffarieh" case (1886) which originated in the capture in the Red Sea by the Egyptian warship "Giaffarieh" of four merchant ships from Massawa under Italian registry. The Foreign Ministry of Italy instructed the Italian Consul General at Cairo that "the act committed by the Giaffarieh was an arbitrary depredation and we have the specific right to request, in addition to compensation for damages, restitution or reimbursement" (La prassi italiana di diritto internazionale, 1st series (Dobbs Ferry, N.Y., Oceana, 1970), vol. II, pp. 901-902).

124/ An example of material restitution of objects is the Temple of Preah Vihear case: in its judgment of 15 June 1962 (I.C.J. Reports, 1962, p. 6, at pp. 36-37), the International Court of Justice decided in favour of the Cambodian claim which included restitution of certain objects that had been removed from the area and the temple by Thai authorities. Reference is also made to the Aloisi case (1881), originating in the seizure of the property of Italian merchants by Chilean military occupation authorities in the Peruvian city of Quilca during the conflict between Chile and Peru (see La prassi italiana ..., (op. cit. (note 123 above), pp. 867-868). Mention may furthermore be made of a number of cases of restitution which were decided by the Franco-Italian Conciliation Commission instituted by the Treaty of Peace of 1947 including the Hôtel Métropole case (Decision No. 65 of 19 July 1950 (United Nations, Reports of International Arbitral Awards, vol. XIII, p. 219)), the Ottoz case (Decision No. 85 of 18 September 1950 (ibid., p. 240)) and the Hénon case (Decision No. 109 of 31 October 1951 (ibid., p. 249)). However since those decisions were based upon conventional rules contemplating restitution of objects, it is of course doubtful whether they are applicable in determining the content of a rule of general (customary) law.

125/ Examples include the "Macedonian" case (1863), in which King Leopold I of Belgium, who had been chosen as arbitrator, decided that "the Government of C. [Chile] shall restitute to that of the U.S. [United States] 3/5 of the 70,400 piastres or dollars seized", plus 6 per cent interest, namely the sum confiscated from a United States national by Chilean insurgents (A. de Lapradelle and N. Politis, Recueil des arbitrages internationaux (Paris, Pedone, 1923), vol. II, p. 182, at p. 204); the "Presto" case (1864), in which the Italian Foreign Minister, admitting the error of Licata Customs in imposing the payment of a toll by the Norwegian ship "Presto", provided for restitution of the unduly paid sum (La prassi italiana ..., (op. cit. (note 123 above), pp. 878-879); and the Emanuele Chiesa case (1884), in which the Chilean Government returned, with interest, a sum unduly taken from an Italian national arbitrarily accused of collaboration with Peru during the conflict between Chile and Peru (ibid., pp. 899-900). Many other examples are to be found in the practice of Mixed Claims Commissions: see, among others, the Turnbull and Orinoco Company cases (United Nations, Reports of International Arbitral Awards, vol. IX, pp. 26 et seq., the Compagnie générale des asphaltes de France case (ibid, pp. 389 et seq.), the Palmarejo and Mexico Gold Fields case (ibid., vol. V used with reference to the case where implementation of restitution requires or involves the modification of a legal situation either within the legal system of the author State or within the framework of the international legal relations between the author State and one or more author States. Hypotheses of juridical restitution include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law, 126/ the rescinding of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner 127/ or the nullification of a treaty. 128/

(pp. 298 et seq.); the *Societá Anonima Michelin Italiana* case (ibid., vol. XIII, p. 625) and the *Wollenberg* case, (ibid., vol. XIV, p. 291).

Shares have also been considered susceptible of *restitutio*). In the *Buzau-Nehoiasi Railway* case between Germany and Romania, for instance, the decision of the arbitral tribunal of 7 July 1939 provided for the restitution to a German company (Berliner Handelsgesellschaft) of 1,196 shares of the Romanian company Buzau-Nehoiasi Railway following the German Government's claim to that effect (ibid., vol. III, p. 1839).

126/ Mention may be made in this context of the abrogation of *Article 61 (2) of the Weimar Constitution* (Constitution of the Reich of 11 August 1919), which, in violation of the Treaty of Versailles of 28 June 1919, provided for the participation of Austrian delegates in the German Reichsrat; following French protests, the provision was annulled by Germany (lop. cit., (note 105 above), p. 1094).

127/ An example is the *Martini* case in which the arbitral tribunal decided (decision of 3 May 1930) that the Venezuelan Government was under an obligation to annul the judgment of the Venezuelan Federal and Appeals Court that had annulled the railway and mining concession granted to an Italian company (United Nations, *Reports of International Arbitral Awards*, vol. II, pp. 973 et seq.

128/ In the *Bryan Chamorro Treaty case*, El Salvador requested that:

> "the appropriate decree be issued fixing the legal situation to be maintained by the Government of Nicaragua in the matter which is the subject of this complaint, in order that the things here in litigation may be preserved in the status in which they were found before conclusion and ratification of the Bryan-Chamorro Treaty.

After expressing its opinion on the juridical status of Fonseca Bay, the Central American Court of Justice decided:

> "...

(7) The Commission has not seen any need to reflect in the text of article 7 the doctrinal distinction between material and juridical restitutio which it considers, from the viewpoint of the relations deriving from an internationally wrongful act, as a relative one. In the first place, one can hardly conceive a restitution to be effected by a State - whether of territory, persons or movable objects - which would involve purely material operations. To return an unlawfully occupied or annexed territory, to withdraw a customs line unlawfully advanced, to restore to freedom a person unlawfully arrested and detained, or to re-establish in their homeland a group of persons unlawfully expelled and expropriated, legal provision must be made

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> Third. That the Bryan-Chamorro Treaty of August fifth, nineteen hundred and fourteen, involving the concession of a naval base in the Gulf of Fonseca, constitutes a menace to the national security of El Salvador and violates her rights of co-ownership in the waters of said Gulf ...;
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> Fourth. That said treaty violates Articles II and IX of the Treaty of Peace and Amity concluded at Washington by the Central American States on the twentieth of December, nineteen hundred and seven;
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> Fifth. That the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action ...". (Anales de la Corte de Justicia Centroamericana (San José, Costa Rica), vol. VI, Nos. 16-18 (December 1916-May 1917), p. 7; The American Journal of International Law (Washington, D.C.), vol. 11 (1917), pp. 674 et seq., at p. 683 and 696).

Another example is the Legal Status of Eastern Greenland case, in which Denmark asked the PCIJ for judgment to the effect that:

> "the promulgation of the above-mentioned declaration of occupation and any steps taken in this respect by the Norwegian Government constitute a violation of the existing legal situation and are accordingly unlawful and invalid."

The Court decided:

> "that the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid."

(P.C.I.J., Series A/B, No. 53, judgment of 5 April 1933, p. 22 at pp. 23 and 75).

at the constitutional, legislative, judicial and/or administrative level. From that viewpoint restitutio will be essentially legal. Material restitutio will merely be in such cases a translation into facts of legal provisions. Except in rare instances, as in a trivial case of frontier guards casually and innocently trespassing on foreign territory or in a case of harassment of a diplomat by municipal policemen in the course of a traffic jam (two cases that would probably not even reach the threshold of an internationally wrongful act), it would seem rather difficult to imagine cases of purely material international restitutio. In practice, any international restitution in kind will be an essentially juridical restitutio within the legal system of the author State, accompanying or preceding material restitutio. 129/ In the second place, it should be borne in mind that from the viewpoint of international law - in conformity with the generally recognized separation between legal systems - rules of municipal law as well as administrative or judicial decisions must be viewed as mere facts. It is useful to recall what the P.C.I.J. stated in that respect when it was confronted with the question whether and in what sense it would be appropriate for it to deal, within the framework of international adjudication, with a piece of the national legislation of a State:

> "It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of 14 July 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgement

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129/ An example of a case in which the legal and the material elements are closely bound together is the Peter Pázmány University case in which the P.C.I.J. decided, against the contention of Czechoslovakia (that on the basis of the Treaty of Trianon of 4 June 1920 there was no title to restitution);

> "(b) that the Czechoslovak Government is bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question".

(Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), judgement of 15 December 1933, P.C.I.J., Series A/B, No 61, p. 208, at p. 249). It is obvious that here restitutio would involve both legal and material actions.

> on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention." 130/

(8) The Commission concludes that, in so far as the distinction between material and legal restitutio may be of relevance within the national legal system of the author State, it merely stresses the different kinds of operation which the organs of the author State should carry out in order to achieve restitution in kind. One set of actions, which may be placed under the heading of material restitutio, are those actions of State organs which, from the point of view of national law, do not require any modifications of a legal nature. Another group would consist of such actions of legislative, administrative or judicial organs as are of legal relevance from the point of view of the municipal law of the author State and in the absence of which restitution would not be feasible. It follows that, as a rule, material and legal restitutio should be viewed not so much as different remedies but as distinct aspects of one and the same remedy.

(9) In the hypothetical case where restitutio involves only international (instead of merely national) legal aspects, the distinction might appear to be of greater moment, as the necessary legal operation would entail the modification of an international legal relationship, situation or rule. One example could be a case where restitutio by author State A in favour of injured State B involved the annulment of a treaty relationship with State C. Another example would be a case where restitutio by State A in favour of State B involved the renunciation of a claim or the annulment or withdrawal of a unilateral act. In this context, the question arises whether, in what sense and under what conditions a third party decision (of a permanent or ad hoc international body) could bring about directly - by the modification or annulment of legal situations, acts or rules - any form of legal restitutio within the national law of the author State or within international law itself. With regard to national law, reference can indeed be found in the literature to "invalidities" or "nullities" to be attached to national administrative and judicial acts or to legislative or constitutional

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130/ Case concerning Certain German interests in Polish Upper Silesia (Merits), judgment of 25 May 1926, P.C.I.J., Series A, No 7, p. 19.

provisions on the strength of international law. 131/ In practice, the Legal Status of Eastern Greenland case 132/ provides the best known example of the use of similar concepts. The Commission is of the view that all that international law - and international bodies - are normally fit or enabled to do with regard to internal legal acts, provisions or situations is to declare them to be in violation of international obligations and as such sources of international responsibility and further to declare the duty of reparation, such reparation requiring, as the case may be, invalidation or annulment of internal legal acts on the part of the author State itself. 133/ As regards the question whether it is possible for an international tribunal to directly annul international legal rules, acts, transactions or situations, for the purpose of reparation in the form of restitution in kind, 134/ the Commission is inclined to answer it in the

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131/ See for example F.A. Mann, "The consequences of an international wrong in international and municipal law", The British Year Book of International Law, 1976-1977, vol. 48, pp. 5-8.

132/ Cited in note 128 above.

133/ Along those lines, B. Graefrath (op. cit. (note 96 above), p. 78) states as follows:

> "In general, however, the elimination of an internationally illegal act requires a new action since wrongfulness according to international law does in general not entail invalidity under domestic law."

134/ A case that seems to be rather close to an international legal restitution directly effected by judicial decision is that of the Free Zones of Upper Savoy and the District of Gex in which the P.C.I.J., after deciding, in accordance with article 1 of the Special Agreement between Switzerland and France, that article 435, paragraph 2, of the Treaty of Versailles "neither has abrogated nor is intended to lead to the abrogation of the provisions" of the pre-existing international instruments concerning the "customs and economic regime" of the two areas, concluded (with regard to the further question referred to it under article 2 of the Special Agreement):

> "In regard to the question referred to in Article 2, paragraph 1, of the Special Agreement:
>
> That the French Government must withdraw its customs line in accordance with the provisions of the said treaties and instruments: and that this regime must continue in force so long as it has not been modified by agreement between the Parties"

(P.C.I.J., Series A/B, No 46, judgment of 7 June 1932, p. 96).

affirmative but observes that since the effects of decisions of international tribunals are normally confined to the parties, any act or situation the effects of which extend beyond the bilateral relations between the parties could not be modified or annulled except by the States themselves, unless the relevant instruments provided otherwise.

(10) The injured State's entitlement to restitution in kind is not unlimited. It is subjected to the exceptions listed in *subparagraphs (a) to (d)*. The phrase "provided and to the extent that" which precedes the listing of exceptions makes it clear that if restitution in kind is only partially excluded under any one of the exceptions, then that part of it which it is possible to provide is due.

(11) The first exception to restitution in kind is impossibility and in the first place factual or material impossibility which is dealt with in *subparagraph (a)*. In the case of material restitution, total or partial impossibility derives from the fact that the nature of the event and of its injurious effects have rendered *restitutio* physically impossible. 135/ Such may be the case either because the object to be restored has perished, because it has irremediably deteriorated or because the relevant state of

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Although the Court did not expressly qualify its decision as purporting a French obligation of *restitutio*, the withdrawal envisaged obviously implies, in addition to the cessation of a situation not in conformity with international law, that re-establishment of the *status quo ante* which is at least the main portion of the essential content of *restitutio*.

135/ Doctrine is unanimous in noting that "there is no difficulty as to physical or material impossibility: it is evident that no *restitutio in integrum* may be granted if, for instance, an unlawfully seized vessel has been sunk"; (E. Jimenez de Arachega, op. cit. (note 114 above), p. 566) or if the object is permanently lost or destroyed (G. Balladore Pallieri, op. cit. (note 119 above) p. 720) or, as suggested by Salvioli, "if there are no others of the same kind". (G. Salvioli, op. cit. (note 96 above), p. 237). Alvarez de Eulate speaks of "irreversible situations" and indicates some hypotheses: "dissimilarity between the original situation and the existing situation, especially because of the passage of time ... disappearance or destruction of the property". (M. B. Alvarez de Eulate, op. cit. (note 98 above), pp. 268-269). For similar views, see: D.P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol. II, p. 1115 and G. Schwarzenberger, op. cit., note 115 above, pp. 655 and 658. Mention of material or physical impossibility is also found in practice, especially after the *Chorzów Factory* case.

affairs has undergone a factual alteration rendering physical restitutio impossible. The rule is quite obviously an unavoidable consequence of ad impossibilia nemo tenetur.

(12) A second exception, dealt with in subparagraph (b), concerns the case where restitution in kind encounters an obstacle in a peremptory norm of international law. As has already been noted, the general question of legal impossibility to make restitution encompasses impossibility deriving from international legal obstacles and impossibility deriving from municipal law obstacles. The latter aspect has been dealt with in article 6 bis 136/ since, as indicated in paragraph (10) of the commentary to that article, it may arise in connection with any form of reparation, even though, in practice, it has usually come up in relation to restitution in kind. As regards impossibility deriving from international legal obstacles, subparagraph (b) of the present article gives it a narrow scope, limited to the case where making restitution in kind would violate a peremptory norm of international law. In the other instances of so-called legal impossibility "deriving from international law", it is not really a matter of an "impossibility" affecting the legal obligations to provide restitution in kind. The impossibility derives more precisely from the relativity of international legal situations. Clearly, if the State which should provide restitutio could only do so by infringing one of its international obligations towards a "third" State, this does not really affect the responsibility relationship between the wrongdoing State and the injured State entitled to claim restitutio to the injured State on the one hand and the "third" State on the other hand.

(13) In this context, the Commission has examined the question of the relationship between the general rule which puts the author State under the obligation to provide restitutio in integrum and the concept of domestic jurisdiction. It has come to the conclusion that this concept cannot and should not put into question any other (primary or secondary) obligation deriving from international law. The very existence of an international obligation excludes that a claim to compliance therewith by any State could constitute an attempt against the domestic jurisdiction of that State. As regards in particular the domestic law of the author State, it should be kept

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136/ Under paragraph 3 of article 6 bis, the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

in mind that there is hardly an international rule compliance with which does not imply some repercussion on the municipal law of the State which is bound by the rule. The belief that domestic jurisdiction, and the principle of non-intervention therein, may interfere in any sense with the obligation to provide restitution in kind or any other form of reparation or, for that matter, mere cessation or discontinuance of wrongful conduct derives from a confusion between, on the one hand, the right of the State to obtain *restitutio* (or any form of redress other than *restitutio*), as a matter of substantive law, and on the other hand, the right of an "unsatisfied" injured State to take measures aimed at securing cessation and/or reparation. Unlike the substantive rights to cessation or reparation, such measures must be subject, except in the case of crimes to be determined, to the limit of domestic jurisdiction. Respect for domestic jurisdiction, in other words, is a condition of the lawfulness of an action by a State or by an international body. It is not, and obviously could not be, a condition of lawfulness of an international legal rule or obligation.

(14) The third exception to which the right to obtain *restitutio* is subjected, dealt with in *subparagraph (c)*, is based on equity and reasonableness and seeks to achieve an equitable balance between the *onus* to be sustained by the author State in order to provide restitution in kind and the benefit which the injured State would gain from obtaining reparation in that specific form rather than compensation. It finds support both in doctrine and in practice. A number of writers assert, in fact, that even if the re-establishment of the *status quo ante* or of the situation that would have existed if the wrongful act had not occurred would be physically and/or juridically possible, it would be, in the words of one of them, "unreasonable to allow a claim from *restitutio in integrum* if this mode of reparation would impose a disproportionate burden upon the guilty State and if the delinquency can also be atoned by a pecuniary indemnification". 137/ A similar approach is reflected in paragraph 3 of article 9 of the draft convention on

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137/ J.H.W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1973), part VI, p. 744. A similar position is taken by J. Personnaz (op. cit. (note 99 above) pp. 89-90; and K. Nagy, op. cit. (note 113 above) p. 177).

the responsibility of States for injuries caused in their territory to the person or property of aliens, prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht, 138/ which reads as follows:

> "3. Re-establishment may not be demanded if such a demand is unreasonable, and in particular if the difficulties of re-establishment are disproportionate to the advantages for the injured person."

Subparagraph (c) is similarly based on a comparison between the situation of the wrongdoing State and that of the injured State. The Commission is aware that, for some writers, the comparison should be between the burden for the wrongdoing State and the gravity of the wrongful act. 139/ Viewed in this perspective, the limit of excessive onerousness would assume a different weight according to the qualitative and quantitative dimension of the wrongful act for which reparation is sought. Indeed in the case of the most serious wrongful acts such as aggression or genocide, it would be inequitable for the effort of reparation incumbent upon the author State - including specifically the fullest restitution in kind - to be considered excessive in proportion to the violation committed by that State. This is a point the Commission will explore in depth when it undertakes the analysis of the legal consequences of international crimes.

(15) The exception as formulated in subparagraph (c) may be considered to underlie a number of arbitral decisions including in particular those referred to in paragraph (14) of the commentary to article 6 bis. Mention should also be made in this context of the Forests in Central Rhodopia case, in which the

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138/ Reproduced in Yearbook... 1969, vol. II, pp. 155 et seq, document A/CN.4/217 and Add.1, annex VIII.

139/ According to Personnaz, for instance, "the author of the harmful act should not be required to make too great an effort, out of proportion with the gravity of his delinquency" (op. cit. (note 99 above) pp. 89-90). Along the same lines, article 7 of the draft treaty concerning the responsibility of a State for internationally illegal acts, prepared in 1927 by Karl Strupp provides:

> "An injured State is not unlimited in its election of remedies. Such remedies may not be incommensurate in severity with the original injury or by their nature be humiliating."

(see Yearbook ... 1969, vol. II, p. 157, document A/CN.4/217 and Add.1, annex IX).

judge, while admitting in principle a preference for restitutio, considered it to be less practicable than indemnification, notwithstanding the difficulties the latter would also entail. 140/

(16) The phrase "out of all proportion" makes it clear that the wrongdoing State is relieved of its obligation to make restitution only if there is a grave disproportionality between the burden which this mode of reparation would impose on that State and the benefit which the injured State would derive therefrom. The Commission is aware that, in practice, it may prove difficult to, on the one hand, compare the burden imposed on the wrongdoing State by restitution in kind and the benefit accruing to the injured State in obtaining restitution instead of compensation and, on the other hand, weigh the benefit which the injured State would derive from restitution in kind against the benefit it will derive from compensation. In practice however, the States concerned will normally come to an agreement on the issue, which will then be solved consensually. If third party settlement had ultimately to be resorted to, an equitable balance between the conflicting interests at stake would have to be attained on the basis of facts.

(17) Subparagraph (d) provides that restitution in kind is not mandatory for the wrongdoing State if it would seriously jeopardize its political independence and economic stability whereas failure to obtain restitution in kind would not have a comparable impact on the injured State. The text implies that if the terms of the comparison are equal, then the interest of the injured State would prevail and restitution in kind would have to be provided. The Commission realizes that subparagraph (d) refers to very exceptional situations and may be of more retrospective than current relevance. This is due in large measure to the rise in importance of bilateral investment agreements. The area of foreign investment, to which it principally refers, has been undergoing - also under the influence of a number

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140/ United Nations, Reports of International Arbitral Awards, vol. III, p. 1432.

of resolutions of the General Assembly 141/ - a rather marked evolution. The Commission submits that any provision concerning indemnification has really to do with the content of the primary rule and the conditions thereof rather than the content of the secondary rule on reparation. In the measure, however, in which the matter is of relevance for the purposes of the so-called "secondary" rules, the Commission believes that the quality and quantity of reparation depend, in the first place, on whether the nationalization was a lawful or an unlawful one. Lawful are the nationalizations conforming to the two basic requirements of public interest and non-discrimination. Unlawful are the nationalizations which do not meet both requirements. Unlike unlawful nationalization, which calls for full reparation (namely, restitution in kind and compensation), lawful nationalization would call for adequate compensation. Failure to meet such obligations would of course be, by itself, an internationally wrongful act.

Article 8

Compensation

> 1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
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> 2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

Commentary

(1) Compensation is the main and central remedy resorted to following an internationally wrongful act. As stated by the PCIJ in the Chorzow Factory case, "it is a principle of international law that the reparation of a wrong

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141/ It is hardly necessary to recall such General Assembly resolutions as resolutions 1803 (XVII) of 14 December 1962 and 3171 (XXVIII) of 17 December 1973 on permanent sovereignty over natural resources; the Declaration on the Establishment of a New International Economic Order (resolution 3201 (S-VI) of 1 May 1974); and the Charter of Economic Rights and Duties of States (resolution 3281 (XXIX) of 12 December 1974). On the principle of self-determination and permanent sovereignty over natural resources as related to the issue of nationalizations in international law, see R. Bystricky, "Notes on certain international legal problems relating to socialist nationalization", VIth Congress of the International Association of Democratic Lawyers (Brussels, 22-25 May 1956) (Brussels, [n.d.]), p. 15.

may consist of an indemnity ... this is even the most usual form of reparation". 142/ Compensation is of course not the only mode of reparation consisting in the payment of a sum of money: nominal damages or damages reflecting the gravity of the infringement, both dealt with in article 10 on satisfaction are also of a pecuniary nature but they perform a function distinct from that of compensation, even considering that a measure of retribution is present in any form of reparation.

(2) The distinction between payment of moneys by way of compensation and payment of moneys for other purposes is generally recognized and frequently emphasized in the relevant literature. 143/ Explicit indications in the same sense are also to be found in jurisprudence. In the Lusitania case, for example, the umpire expressed himself clearly when he stated:

> "The fundamental concept of 'damages' is ... reparation for a loss suffered, a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole. The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought ... (emphasis added)"

Another instance is the case concerning the Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war, 144/ in

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142/ P.C.I.J., Series A, No. 17, judgement of 13 September 1928, p. 47.

143/ See for instance C. Eagleton, The Responsibility of States in International Law (New York, 1928):

> "The usual standard of reparation, where restoration of the original status is impossible or insufficient, is pecuniary payment ... It has usually been said that the damages assessed should be for the purpose only of paying the loss suffered, and that they are thus compensatory rather than punitive in character ... (p. 189) (emphasis added).

Along the same lines see E. Jimenez de Arechaga, op. cit., (note 114 above).

144/ United Nations, Reports of International Arbitral Awards, vol. II, pp. 1035 et seq.

which the arbitral tribunal unambiguously separated the compensatory and punitive consequences of the German conduct. 145/

(3) In formulating the rules governing compensation, the Commission has taken cognizance of the natural tendency of arbitral tribunals and commissions to have recourse to rules of private law, particularly of Roman law. 146/ It

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145/ Decision of 30 June 1930 (Portugal v. Germany) (Ibid., vol. II, pp. 1035 et seq.). The tribunal stated:

> "In addition to reparation for actual damage caused by the acts committed by Germany during the period of neutrality, Portugal claims an indemnity of 2,000 million gold marks because of 'all the offences against its sovereignty and for the violation of international law'. It makes this claim on the grounds that the indemnity under this heading 'will demonstrate the gravity of the acts in terms of international law and the rights of peoples' and 'it will help ... to show that such acts cannot continue to be performed with impunity'. Apart from the sanction of disapproval by conscience and by international public opinion, they would be matched by material sanctions ..."
>
> "It is therefore very clear that it is not in reality an indemnity, or reparation for material or even moral damage, but rather sanctions, a penalty inflicted on the guilty State and based, like penalties in general, on ideas of recompense, warning and intimidation. Yet it is obvious that, by assigning an arbitrator the task of determining the amount of the claims for the acts committed during the period of neutrality, the High Contracting Parties did not intend to vest him with powers of repression. Not only is paragraph 4, under which he is held competent, contained in Part X of the Treaty, entitled 'Economic clauses', whereas it is Part VII that deals with 'Sanctions', but it would be contrary to the clearly expressed intentions of the Allied Powers to say that they contemplated imposing pecuniary penalties on Germany for the acts it committed, since article 232, paragraph 1, expressly recognizes that even simple reparation of the actual losses it had caused would exceed its financial capacity. The sanction claimed by Portugal therefore lies outside the competence of the arbitrators and the context of the Treaty." (Ibid., pp. 1076-1077).

146/ The influence of rules of private law is acknowledged by many writers including K. Nagy, op. cit. (note 113 above), pp. 178-179; C. Čepelka, op. cit., (note 96 above); L. Reitzer, la réparation comme conséquence de l'acte illicite en droit international (Paris, 1938), pp. 161-162 and D. Anzilotti, op. cit. (note 99 above), p. 524. The last two writers however disagree on the status of the principles of municipal law as applied in the relevant international jurisprudence. Anzilotti takes the view that in resorting to the rules of private law, international tribunals do not apply national law as such; they apply international legal principles modelled on municipal principles or rules. Reitzer, on the other hand, considers that the rules of private law do not form part of general international law.

has at the same time recognized with the majority of the doctrine, 147/ that it was impossible, in view of the number and variety of concrete cases to find or even conceive very detailed rules applying mechanically or indiscriminately to any cases or groups of cases. It has therefore concluded that the rules on compensation were bound to be relatively general and flexible, even though they could be formulated so as to set forth the rights of the injured State and the corresponding obligations of the wrongdoing State.

(4) Paragraph 1 provides that the injured State is "entitled" to obtain from the wrongdoing State compensation for the damage "caused" by that act, "if and to the extent that the damage is not made good by restitution in kind". The concept of entitlement, the requirement of a causal link and the relationship between compensation and restitution in kind will now be dealt with in the above order.

(5) Like all the articles on reparation, article 8 is couched in terms of an entitlement of the injured State and makes the discharge of the duty of compensation conditional upon a corresponding claim on the part of the injured State.

(6) The requirement of a causal link between the wrongful act and the damage calls for more extensive comments. While the requirement itself is universally taken for granted, the distinction between the consequences that may be considered to have been caused by a wrongful act, and hence indemnifiable, from the ones not to be considered as such and therefore not indemnifiable has attracted considerable attention in doctrine and in practice. For some time in the past, this question has been discussed in terms of a distinction between "direct" and "indirect" damage. This approach, however, has given rise to doubts because of the ambiguity and the scant utility of such a distinction. 148/ In international

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147/ B. Graefrath, op. cit. (note 96 above), p. 101. See also J.H.W. Verzijl, op. cit (note 137), pp. 746-747; C. Eagleton (op. cit. (note 143 above)), p. 191; L. Reitzer, op. cit. (note 146 above); and C.D. Gray, op. cit. (note 97 above) pp. 33-34.

148/ See J. Personnaz, op. cit. (note 99 above), p. 135; C. Eagleton, op. cit. (note 143 above), pp. 199-202; G. Morelli, op. cit. (note 99 above), p. 365; B. Bollecker-Stern, op. cit. (note 96 above), pp. 204-211; and C.D. Gray, op. cit. (note 97 above) p. 22.

jurisprudence, 149/ the expression "indirect damage" has been used to justify decisions not to award damages. No clear indication was given, however, about the kind of relationship between event and losses that would justify their qualification as "indirect". 150/ Also worthy of mention in this context are two statements of the United States-German Mixed Claims Commission. The first, which is to be found in the decision taken by the Commission in the South Porto Rico Company 151/ case describes the term "indirect" used with regard to damage as "inapt, inaccurate and ambiguous" and the distinction between "direct" and "indirect" damage as "frequently illusory and fanciful". The second is taken from administrative decision No. II 152/ of the Commission, dated 1 November 1923, and reads:

> "It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connexion between Germany's act and the loss complained of ..."

(7) Rather than the directness of the damage, the criterion is thus indicated as the presence of a clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed. For injury to be indemnifiable, it is necessary for it to be linked to an unlawful act by a relationship of cause and effect 153/ and an injury is so linked to an unlawful act whenever the normal and natural course of events would indicate that the injury is a logical consequence of the act or whenever the author of the unlawful act could have foreseen the damage it caused. Although the conditions of normality and predictability nearly always coexist (in the sense

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149/ The Alabama case is cited by Hauriou ("Les dommages indirects dans les arbitrages internationaux", Revue générale de droit international public, vol. 31 (1924), p. 209) as the most striking application of the rule excluding "indirect" damage.

150/ See in that sense D. Anzilotti, op. cit. (note 99 above), p. 431; A. Hauriou, op. cit. (note 149 above) and L. Reitzer, op. cit. (note 146 above), p. 180.

151/ This was one of the War-Risk Insurance Premium Claims cases; decision of 1 November 1923 of the Mixed Claims Commission (United Nations, Reports of International Arbitral Awards, vol. VII, pp. 62-63).

152/ Ibid., p. 29.

153/ In this sense, J. Personnaz, op. cit. (note 99 above), p. 136; C. Eagleton, op. cit. (note 143 above), pp. 202-203.

that the causing of the damage could also have been predicted if it were within the norm), 154/ they receive varying degrees of emphasis in practice. Predictability prevails in judicial practice. One clear example is the decision in the Portuguese Colonies case (Naulilaa incident). 155/ The injuries caused to Portugal by the revolt of the indigenous population in its colonies were attributed to Germany because it was alleged that the revolt had been triggered by the German invasion. The responsible State was therefore held liable for all the damage which it could have predicted, even though the link between the unlawful act and the actual damage was not really a "direct" one. On the contrary, damages were not awarded for injuries that could not have been foreseen:

> ... it would not be equitable for the victim to bear the burden of damage which the author of the initial unlawful act foresaw and perhaps even wanted, simply under the pretext that, in the chain linking it to his act, there are intermediate links. Everybody agrees, however, that, even if one abandons the strict principle that direct damage alone is indemnifiable, one should not necessarily rule out, for fear of leading to an inadmissible extension of liability, the damage that is connected to the initial act only by an unforeseen chain of exceptional circumstances which occurred only because of a combination of causes alien to the author's will and not foreseeable on his part ... 156/

(8) The Commission does not consider it correct to exclude predictability from the requisites for determining causality for the purposes of compensation. At most it can be said that the possibility of foreseeing the damage on the part of a reasonable man in the position of the wrongdoer is an important indication for judging the "normality" or "naturalness" which seems to be an undeniable prerequisite for identifying the causality link. Administrative decision No. II of the United States-German Mixed Claims Commission, mentioned above, once again provides a valuable example of the way in which the test of normality is applied in identifying the causality link:

> ... It matters not how many links there may be in the chain of causation concerning Germany's act with the loss sustained, provided there is no

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154/ See for example G. Salvioli, op. cit. (note 96 above), p. 251; L. Reitzer, op. cit. (note 146 above), p. 183.

155/ Decision of 31 July 1928 (Portugal v. Germany) (United Nations: Reports of International Arbitral Awards, vol. II, pp. 1011 et seq.).

156/ Ibid., p. 1031.

> break in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act ... 157/

(9) The criterion for presuming causality when the conditions of normality and predictability are met requires further explanation. Both in doctrine and in judicial practice, one notes a tendency to identify the criterion in question with the principle of proxima causa as used in private law. Brownlie, referring to the Dix case, 158/ says that:

> "There is some evidence that international tribunals draw a similar distinction, and thus hold governments responsible 'only for the proximate and natural consequences of their acts', denying 'compensation for remote consequences, in the absence of evidence of deliberate intention to injure'." 159/

Following the disintegration of the Cosmos 954 Soviet satellite with nuclear power source on board over its territory in 1978, Canada stated in its claim:

> "In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty." 160/

157/ The Commission added:

> "Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed. The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?" (Ibid., vol. VII, p. 30).

158/ Decision handed down in 1903 by the United States-Venezuelan Mixed Claims Commission (United Nations, Reports of International Awards, vol. IX, pp. 119 et seq., at p. 121).

159/ J. Brownlie, System of the Law of Nations: State responsibility, part I (Oxford, Clarendon Press, 1983), p. 224.

160/ International Legal Materials, vol. XVIII (1979), p. 907, paragraph 23 of the claim.

(10) It seems therefore that an injudicious use of the adjective "proximate" (with reference to "cause") in order to indicate the type of relation which should exist between an unlawful act and indemnifiable injury is not without a certain degree of ambiguity. That adjective would seem utterly to exclude the indemnifiability of damage which, while linked to an unlawful act, is not close to it in time or in the causal chain.

(11) The Commission is thus inclined to think that the causal link criterion should operate as follows:

(i) Damages must be fully paid in respect of injuries that have been caused immediately and exclusively by the wrongful act; 161/

(ii) Damages must be fully paid in respect of injuries for which the wrongful act is the exclusive cause, even though they may be linked to that act not by an immediate relationship but by a series of events each exclusively linked with each other by a cause-and-effect relationship.

Causation is thus to be presumed not only in the presence of a relationship of "proximate causation". It is to be presumed whenever the damage is linked to the wrongful act by a chain of events which, however long, is uninterrupted.

(12) Consideration must be given to cases in which injuries are not caused exclusively by an unlawful act but have been produced also by concomitant causes among which the wrongful act plays a decisive but not exclusive role. One possibility, already dealt with in the context of article 6 bis, is that the damage may be partly due to the negligence or to a deliberate act or omission of the injured State. Other hypotheses concern the concurrent wrongdoing of several States 162/ and the intervention of an independent cause external to the wrongdoing State resulting in an aggravation of the harm that would have otherwise resulted from the wrongful act.

(13) Innumerable elements, of which actions of third parties and economic, political and natural factors are just a few, may contribute to a damage as

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161/ J. Combacau, "La responsabilité internationale", in H. Thierry and others, Droit international public, 4th ed. (Paris, Montchrestien, 1984), speaks in such a case of a "causalité au premier degré: celle qui unit sans aucun intermédiaire le fait générateur au dommage" (p. 711).

162/ The Nauru case which is pending before the ICJ might provide useful indications in this context.

concomitant causes. 163/ In such cases, as in the case dealt with in paragraph 2 of article 6 *bis*, to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of damages in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects, the amount to be awarded being determined on the basis of the criteria of normality and predictability. 164/ In view of the diversity of possible situations, the Commission has not attempted to find any rigid criteria applicable to all cases or to indicate the percentages to be applied for damages awarded against an offending State when its action has been one of the causes, decisive but not exclusive, of an injury to another State. It would, in its view, be absurd to think in terms of laying down in a universally applicable formula the various hypotheses of causal relationship and to try to provide a dividing line between damage for which compensation is due from damage for which compensation is not due. The application of the principles and criteria discussed above can only be made on the basis of the factual elements and circumstances of each case, where the discretionary power of arbitrators or the diplomatic abilities of negotiators

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163/ One example is the Yuille, Shortridge and Co. case (Decision of 21 October 1861 (Great Britain v. Portugal) (Lapradelle-Politis, Vol. II, pp. 78 et seq.)). The case concerned an English wine-exporting company with registered office in Portugal, which was wrongly found liable by the Portuguese courts after an irregular procedure. The main injury for which the company sought reparation was represented by the costs it had sustained in the course of the hearing. "Accessory injuries" were the fall in sales, since the company's activities had been partly paralysed. As summed up by A. Hauriou (op. cit. (note 149 above)), p. 216,

> "... the question was precisely to determine whether the hearing was the sole cause of the fall in sales or whether other causes were involved. It was obvious that extraneous circumstances had contributed to the decline in the company's profits. The arbitrators noted, for example, a crisis in wine production from 1839 to 1842, as well as losses from the bad conditions under which some wine consignments had been made. Consequently, the damage qualified as 'indirect', namely the decline in the company's profits, is the result of different causes. Some relate to the denial of justice suffered by the company, but others are totally extraneous."

164/ See in this connection, G. Salvioli, op. cit. (note 96 above), p. 203; J. Personnaz, op. cit. (note 99 above), p. 143; and C.D. Gray, op. cit. (note 97 above), p. 23.

will have to play a decisive role in judging the degree to which the injury is indemnifiable. This is especially true whenever the causal chain between the unlawful act and the injury is particularly long and linked to other causal factors. 165/

(14) The concluding clause of paragraph 1 "if and to the extent that the damage which the injured State has suffered is not made good by restitution in kind" clarifies the relationship between restitution in kind and compensation as forms of reparation. Restitution in kind, despite its "primacy" as a matter of equity and legal principle, is very frequently inadequate to ensure a complete reparation: it may be partially or entirely ruled out either on the basis of subparagraphs (a) to (d) of article 7 or because the injured State prefers to have reparation provided in the form of compensation; it may also be insufficient to ensure full reparation. The role of compensation is to fill in any gaps, large, small or minimal which may be left in full reparation by the noted frequent inadequacy of restitution in kind.

165/ As observed by L. Reitzer,

> "... Causality is the chain of an infinite number of causes and effects: the injury sustained is due to a multitude of factors and phenomena. An international judge must say which of them have produced the injury, in the normal course of things, and which, indeed, are extraneous. He must, more particularly, decide whether, according to the criterion of normality, the injury is or is not attributable to the act in question. This calls for a choice, a selection, an assessment, of the facts which, in themselves, are all of equal value. In this work of selection, an arbitrator is compelled to do things according to his own lights. It is he who breaks the chain of causality, so as to include one category of acts and events and to exclude another, guided by his wisdom and his perspicacity alone. Whenever the arbitrator finds nothing useful in the precedents, his freedom of judgment takes over." (op. cit. (note 146 above), pp. 185 et seq).

Also relevant are the remarks made by J. Personnaz according to whom:

> "The existence of relationships [of causality] is a question of fact and must be established by the judge; it cannot be locked in formulas, for it is a case-by-case matter." (op. cit. (note 99 above), p. 129.)

The same writer states further on:

> "It is a question that cannot be resolved by principles, but solely in the light of the facts of the particular case, and in examining them the judge will, if there are no restrictions in the compromise, have full powers of appraisal." (ibid., p. 135).

(15) Since both articles 7 and 8 are couched in terms of an entitlement of the injured State, the Commission considers it unnecessary, in the case of a bilateral situation, to expressly provide for the injured State's freedom to choose between restitution in kind and compensation. At the same time, the Commission is aware that, where there is a plurality of injured States, difficulties may arise if the injured States opt for different forms of remedy. This question is part of a cluster of issues which are likely to come up whenever there are two or more injured States which may be equally or differently injured. It has implications in the context of both substantive and instrumental consequences of internationally wrongful acts and the Commission intends to revert to it in due course.

(16) Paragraph 2 of article 8 deals with the scope of compensation. Consisting as it does in the payment of a sum of money substituting for or integrating restitution in kind, compensation is the appropriate remedy for "economically assessable damage" i.e. damage which is susceptible of being evaluated in economic terms. As such, it is often described as covering all the "material" injury suffered by the injured State. Correct in a sense, this description calls for important qualifications. It is true that compensation does not ordinarily cover the moral (non-material) damage to the injured State, this function being normally performed by another form of reparation, namely satisfaction as dealt with in article 10. It is not true however that compensation does not cover moral damage to the persons of the injured State's nationals or agents as human beings. The ambiguity is due to the fact that moral damage to the injured State and moral damage to the injured State's nationals or agents receive different treatment from the point of view of international law.

(17) The most frequent among internationally wrongful acts are those which inflict damage upon natural or juridical persons connected with the State, either as mere nationals or as agents. This damage, which internationally affects the State directly even though the injury is sustained by nationals or agents as human beings, is not always an exclusively material one. On the contrary, it is frequently also, or even exclusively, moral damage - and a moral damage which, no less than material damage, is susceptible of a valid claim for compensation.

(18) One of the leading cases in that sense is the Lusitania case, decided by the United States-German Mixed Claims Commission in 1923. 166/ The case dealt with the consequences of the sinking of the British liner by a German submarine. In regard to the measure of the damages to be applied to each one of the claims originating from the American losses in the event, the umpire stated that both the civil and the common law recognized injury caused by "invasion of private right" and provided remedies for it. The umpire was of the opinion that every injury should be measured by pecuniary standards and referred to Grotius' statement that "money is the common measure of valuable things". 167/ Dealing in particular with the death of a person, he held that the preoccupation of the tribunal should be to estimate the amounts

> "(a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant". 168/

Apart from the umpire's considerations regarding the damages under points (a) and (b), it is of interest to note what he stated with regard to the injuries described under point (c). According to him, international law provides compensation for mental suffering, injury to one's feelings, humiliation, shame, degradation, loss of social position or injury to one's credit and reputation. Such injuries, the umpire stated:

> "are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated" ... 169/

These kinds of damages, the umpire added, were not a "penalty".

166/ Decision of 1 November 1923 (United Nations, Reports of International Arbitral Awards, vol. VII, pp. 32 et seq.).

167/ Ibid., p. 35.

168/ Ibid. (emphasis added).

169/ Ibid., p. 40.

(19) The Lusitania case should not be considered as an exception. Although such cases have not occurred very frequently, international tribunals have always granted pecuniary compensation, whenever they deemed it necessary, for moral injury to private parties. 170/ Practice therefore shows that moral (or non-patrimonial) losses caused to private parties by an internationally wrongful act are to be compensated as an integral part of the principal damage suffered by the injured State. The Commission however refrained from expressly providing in article 8 for compensation of the moral damage to nationals of the injured State since this is part of the material damage to the State.

(20) In the light of the above, the phrase "economically assessable damage" covers both:

(i) damage caused to the State's territory in general, to its organization in a broad sense, its property at home and abroad, its

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170/ Examples are the Chevreau case (Decision of 9 June 1931 (France v. United Kingdom) (United Nations, Reports of International Arbitral Awards, vol. II, p. 1113 et seq.; English translation in American Journal of International Law, vol. 27 (1933), pp. 153 et seq.); the Gage case (Decision handed down in 1903 by the United States-Venezuela Mixed Claims Commission (United Nations, Reports of International Arbitral Awards, vol. X, pp. 226 et seq); and the Di Caro case (Decision handed down in 1903 by the Italian-Venezuelan Mixed Claims Commission (ibid., vol. IX, pp. 597-598). In the latter instance, which concerned the killing of an Italian shopkeeper in Venezuela, the Italian-Venezuelan Mixed Claims Commission took account not only of the financial deprivation suffered by the widow of the deceased, but also of the shock suffered by her and of the deprivation of affection, devotion and companionship that her husband could have provided her with (ibid., p. 598).

Another clear example of pecuniary compensation of moral damage suffered by a private party is the Heirs of Jean Maninat case. (Decision of 31 July 1905 of the Franco-Venezuelan Mixed Claims Commission (ibid., pp. 55 et seq.). Rejecting the claim for compensation of the material-economic damage, which he deemed to be insufficiently proved, the umpire awarded to the sister of Jean Maninat (victim of an aggression) a sum of money by way of pecuniary compensation for the death of her brother. Mention should also be made of the Grimm case decided by the Iran-United States Claims Tribunal, but only to that part of the tribunal's decision in which moral damages seem to be referred to and in principle to be considered as a possible object of pecuniary compensation (Decision of 18 February 1983 (International Law Reports, vol. 71, pp. 650 et seq., at p. 653).

military installations, diplomatic premises, ships, aircraft, spacecraft, etc. (so-called "direct" damage to the State); 171/ and

(ii) damage caused to the State through the persons, physical or juridical, of its nationals or agents (so-called "indirect" damage to the State). 172/

(21) The latter class of damage embraces both the "patrimonial" loss sustained by private persons, physical or juridical, and the "moral" damage suffered by such persons. It also includes, a fortiori, the personal injury caused to the said private parties by the wrongful act. This refers, in particular, to such injuries as unjustified detention or any other restriction of freedom, torture or other physical damage to the person, death, etc.

(22) Injuries of the latter kind, in so far as they are susceptible of economic assessment, are treated by international jurisprudence and State practice according to the same rules and principles as those applicable to the pecuniary compensation of material damage to the State. It is actually easy to find a clear tendency to extend to the said class of "personal" injuries

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171/ Examples of "direct" damage to the State are found in such cases as the Corfu Channel case (Merits), I.C.J. Reports, 1949, p. 4, and the case concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports, 1980, p. 3. In the literature, see in particular Brownlie, op. cit., (note 159 above), pp. 236-240.

172/ That the damage suffered by the State through its nationals (and, it should be added, through its agents in their private capacity) is a "direct" damage to the State itself - notwithstanding its frequent qualification as "indirect" damage - is explained in masterly fashion by Reuter:

> "... the modern State socializes all private assets by taxation, as it socializes part of private expenditures by taking over health costs or part of the risks attached to human existence. In an even more general way, the State now actually picks up all the elements of economic life. All property and all income, all debts and all expenditures, even of a private character, are set down in a system of national accounts and its teachings are one of the tools of the economic policy of all governments and thus under its sway.
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> "Nowadays, therefore, it can no longer be said that the damage sustained by private individuals is attributed to the State by a purely formal mechanism; economically that is so: it is the Nation, represented by the State, that bears the burden, at least to some extent, of the loss first suffered by a private individual." (P. Reuter, "Le dommage comme condition de la responsabilité internationale", Estudios de Derecho Internacional: Homenaje al Profesor Miaja de la Muella (Madrid, Tecnos, 1979), vol. II, pp. 841-842.

the treatment afforded to strictly "patrimonial" damages. A typical example is that of the death of a private national of the State concerned. In awarding pecuniary compensation, jurisprudence seems to refer in such a case to the economic loss sustained, as a consequence of the death, by the persons who were somehow entitled to consider the existence of the deceased as a "source" of goods or services susceptible of economic evaluation. One should recall in this respect the first two points made by the umpire in the _Lusitania_ case. According to the umpire, the damage to be compensated in case of death should be calculated on the amount: "(a) which the decedent, had he not been killed, would probably have contributed to the claimant" and on "(b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision." _173_/ This approach to reparation was clearly followed by the International Court of Justice in the _Corfu Channel_ case (United Kingdom v. Albania). _174_/ The Court upheld the United Kingdom's claims in respect of the casualties and injuries sustained by the crew and awarded a sum covering "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc." _175_/ The _Corfu Channel_ case shows that pecuniary compensation is awarded not only in cases of death but also in cases of physical or psychological injury. Among the numerous similar cases, one which is generally considered to be a classic example of this approach to "personal" damage is the _William McNeil_ case, _176_/ where the personal injury had consisted in a serious and long-lasting nervous breakdown caused to that British national as a result of the cruel and psychologically traumatic treatment to which he had been subjected by Mexican authorities whilst in prison. The British-Mexican Claims Commission pointed out that:

_173_/ Private parties include, as well as the State's nationals, agents of the State in so far as they are privately affected by the internationally wrongful act.

_174_/ Judgment of 15 December 1949 (Assessment of the amount of compensation), _I.C.J. Reports, 1949_, p. 244.

_175_/ Ibid., p. 249.

_176_/ Decision of 19 May 1931 of the British-Mexican Claims Commission (United Nations, _Reports of International Arbitral Awards_, vol. V, pp. 164 et seq.).

> "... It is easy to understand that this treatment caused the serious derangement of his nervous system, which has been stated by all the witnesses. It is equally obvious that considerable time must have elapsed before this breakdown was overcome to a sufficient extent to enable him to resume work, and there can be no doubt that the patient must have incurred heavy expenses in order to conquer his physical depression." 177/

(23) Having noted that after his recovery, McNeil had practised a rather lucrative profession, the Commission took the view that "the compensation to be awarded to the claimant must take into account his station in life, and be in just proportion to the extent and to the serious nature of the personal injury which he sustained". 178/ This type of reasoning has been used at times by courts in cases in which personal injury consisted in unlawful detention. Particularly in cases in which detention was extended for a long period of time, the courts have been able to quantify compensation on the basis of an economic assessment of the damage actually caused to the victim. One example is the *Topaze* case, decided by the British-Venezuelan Mixed Claims Commission. In view of the personality and the profession of the private victims, the Mixed Commission decided in that case to award a sum of $100 a day to each injured party for the whole period of their detention. 179/ The same method was followed in the *Faulkner* case by the Mexico-United States General Claims Commission, except that this time the daily rate was estimated at $150 in order to take account of inflation. 180/

(24) Paragraph 2 of article 8 provides that compensation "may include interest". This formulation makes it clear that there is no automatic entitlement to the payment of interest and no presumption in favour of the

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177/ Ibid., p. 168.

178/ Ibid.

179/ Ibid., vol. IX, p. 387 et seq., at p. 389.

180/ Decision of 2 November 1926 (ibid., vol. IV, pp. 67 *et seq.*, at p. 71).

injured State. 181/ The Commission however recognizes that the awarding of interest seems to be the most frequently used method for compensating the type of loss stemming from the temporary non-availability of capital. In the words of one writer:

> "... interest, an expression of the value of the utilization of money is nothing more than a means open to the judge for a priori determination of the injury sustained by a creditor from the non-availability of the principle for a given period". 182/

(25) International practice seems to be in support of awarding interest in addition to the principal amount of compensation. The only case in which interest has been denied as a matter of principle (and not because of the circumstances of the case) seems to have been the Montijo case. 183/ By way of examples of the prevailing jurisprudence, reference may be made to the

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181/ Doctrinal views on this point are divided. Some writers (including D. Anzilotti, "Sugli effetti dell'inadempienza di obligazioni internazionali aventi per oggetto una somma di danero", Rivista di diritto internazionale (Rome), vol. VII (1913), p. 61; K. Strupp, op. cit. (note 99 above), p. 212; P. Guggenheim, Traité de droit international public (Geneva, Georg, 1954), vol. II, p. 73; and G. Morelli, op. cit. (note 99 above), p. 358) denies that the payment of interest is the subject of an international obligation. The opposite view is held by others (among whom Lapradelle, commentary of the Dundonald case (Lapradelle-Politis, vol. III, pp. 456 et seq.); G. Salvioli, op. cit. (note 96 above), pp. 278-279; C. Rousseau, Droit international public, vol. V, Les rapports conflictuels (Paris, Sirey, 1983), p. 13; P. Schoen, "Die vôlkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", Zeitschrift für Vôlkerrecht (Breslau), vol. 10, supplement No. 2 (1917), pp. 128-129; Personnaz, op. cit. (note 99 above), p. 186; B. Graefrath, op. cit. (note 96 above), p. 98; and K. Nagy, op. cit. (note 113 above), pp. 182-183.

182/ J.L. Subilia, L'allocation d'intérêts dans la jurisprudence internationale (thesis, University of Lausanne), (Lausanne, imprimerie Vaudoise, 1972), p. 142.

183/ Decision of 26 July 1875 (United States of America v. Colombia) (Moore, Digest, vol. II, pp. 1421 et seq.).

Illinois Central Railroad Co. case, 184/ to the *Lucas* case 185/ and to Administrative Decision No. III of the United States-German Mixed Claims Commission dated 11 December 1923. 186/

(26) In line with its general position that the awarding of interest depends on the circumstances of each case, the Commission considers that the determination of *dies a quo* and *dies ad quem* in the calculation of interest, the choice of the interest rate and the allocation of compound interest are questions to be solved on a case-by-case basis. It is comforted in its position by the diversity of the solutions advocated in the literature or adopted in judicial practice on all these issues. It will be for the judge or other third party involved in the settlement of the dispute to determine in each case whether interest should be paid, bearing in mind the overriding principle of "full reparation" of the damage laid down in article 6 *bis*.

(27) The same remarks apply to compensation for loss of profits even though the concluding part of paragraph 2 of the present article, by qualifying the reference to loss of profits by the phrase "where appropriate", recognizes that compensation for *lucrum cessans* is less widely accepted in the literature and in practice than is reparation for *damnum emergens*. If loss of profits are to be awarded, it would seem inappropriate to award interest on the profit-earning capital over the same period of time, simply because the capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest would be due on the profits which would have been earned - but which have been withheld from the original owner. The essential aim is to avoid "double recovery" in all forms of reparation.

(28) The main problems arising with regard to *lucrum cessans* are those connected with the role of causation and with the correct determination of the

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184/ Decision of 6 December 1926 (United Nations, *Reports of International Arbitral Awards*, vol. IV, pp. 134 et seq.).

185/ Decision of 11 July 1957 (*International Law Reports*, vol. 30 (1966), pp. 220 et seq.).

186/ United Nations, *Reports of International Arbitral Awards*, vol. VII, pp. 66-68.

extent of profits to be compensated, particularly in the case of wrongful acts affecting property rights or "going concerns" of an industrial or commercial nature.

(29) As regards the first point, the prevailing doctrine, opposing notably the dictum of the arbitral tribunal in the Alabama case, 187/ whereby "prospective earnings cannot properly be made the subject of compensation inasmuch as they depend in their nature upon future and uncertain contingencies", 188/ contends that for the purpose of indemnification, it is not necessary for the judge to acquire the certainty that the damage depends on a given wrongful act; it is sufficient - also and especially for lucrum cessans - to be able to presume that, in the ordinary and normal course of events, the identified loss would not have occurred if the unlawful act had not been committed. 189/

(30) The majority of court decisions also seems to move in favour of the indemnifiability in principle of lucrum cessans. The decision in the Cape Horn Pigeon case 190/ is a classic example. The case related to the seizure of an American whaler by a Russian cruiser. Russia accepted its responsibility, and the only thing the arbitrator had to do was establish the amount of compensation. He decided that the compensation should be sufficient to cover not only the real damage already occasioned but also the profits which the injured party had been deprived of because of the seizure.

187/ Decision of 14 September 1872 (United States of America v. Great Britain) (Moore, Digest, vol. I, pp. 653 et seq.).

188/ Ibid., p. 658.

189/ In this sense, see G. Salvioli, op. cit. (note 96 above), pp. 256-257; B. Bollecker-Stern, op. cit. (note 96 above), p. 199; L. Reitzer, op. cit. (note 146 above), pp. 188-189; C. Eagleton, op. cit. (note 143 above), pp. 197-203; and E. Jimenez de Arechaga, op. cit. (note 114 above), pp. 569-570.

190/ Decision of 29 November 1902 (United States of America v. Russia) (United Nations, Reports of International Arbitral Awards, vol. IX, pp. 63 et seq.). Similar conclusions were reached in the Delagoa Bay Railway case (note 97 above), the William Lee case (Decision handed down on 27 November 1867 by the Lima Mixed Commission (Moore, Digest, vol. IV, pp. 3405-3407) and the Yuille Shortridge and Co. case (see note 163 above).

Diametrically opposed conclusions were however reached in the _Canada_ _191_/ and _Lacaze_ _192_/ cases. _Lucrum cessans_ also played a role in the _Chorzow Factory_ case (Merits). The PCIJ decided that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification. _193_/

(31) Of course, a right to compensation for loss of earnings may also arise when individuals are deprived of making use of their working capacity, either as self-employed or as employed persons. This situation can occur, in particular, when an alien is unlawfully deported from his country of residence. In two judgements, the European Court of Human Rights affirmed in principle that the reparation owed to the victim of such a measure included also compensation for loss of earnings, although in both cases it found that a causal link had not been established. _194_/

(32) As for the correct determination of the extent of profits to be compensated, two distinct methods have emerged which are widely used to determine _lucrum cessans_: the so-called "_in abstracto_" and "_in concreto_" systems. The _in abstracto_ method, which is more commonly used, consists in attributing interest on the amounts due by way of compensation of the

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_191_/ Decision of 11 July 1870 (United States of America v. Brazil) (Moore, _Digest_, vol. II, pp. 1733 et seq).

_192_/ Ibid., p. 1746.

_193_/ _P.C.I.J., Series A, No. 17_, pp. 47-48. The Court made the following observations on this point:

> "... Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. If, however, the reply given by the experts ... should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, _the amount of such profit should be added to the compensation to be awarded_." (p. 53)(emphasis added).

_194_/ Judgement of 21 June 1988, _Berrehab_, Publications of the European Court of Human Rights, Series, A: Judgements and Decisions, vol. 138, p. 17; and Judgement of 18 February 1991, _Moustaquim_, ibid, vol. 193, p. 21.

principal damage. 195/ Paradigms other than interest which may be used in the case of business activities are the amount of the profits earned by the same physical or juridical person in the period preceding the unlawful act, or the amount of the profits earned during the same period by similar business concerns. The so-called in concreto system is used when the estimate is "based on the facts of the particular case, on the profits which the injured enterprise or property would have made in the period in question". 196/

(33) The determination of lucrum cessans involves naturally the most problematic choices in cases where the reparation is due for the unlawful taking of foreign property consisting of the totality or a part of a going commercial or industrial concern. A proper analysis of the relevant practice should also take into account in a measure that part of international jurisprudence which has dealt with the lawful expropriation of going concerns. The necessity for the adjudicating bodies to pronounce themselves on the claim of unlawfulness advanced by the dispossessed owner has led them in fact to develop interesting considerations on the principles governing compensation - and notably compensation for lost profits - in case of unlawful taking.

(34) The precedent most frequently recalled is the PCIJ's judgment in the Chorzow Factory case (Merits), in which the necessity of determining the consequences of the unlawful taking by Poland of the assets of German companies moved precisely from an unambiguous and sharp distinction between lawful and unlawful expropriation. 197/ It was after formulating that distinction (and assuming the case before it to be one of unlawful expropriation) that the PCIJ set forth that famous principle of full

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195/ A typical example is the Fabiani case (Decision of 30 December 1896 (France v. Venezuela) (Martens, Nouveau Recueil, 2nd series, vol. XXVII, pp. 663 et seq.)), in which the arbitrator awarded a lump sum for lucrum cessans which was approximately twice the amount that would have been awarded by way of compound interest.

196/ C.D. Gray, op. cit. (note 97 above) p. 26. One example is the Cheek case (Decision of 21 March 1898 (United States of America v. Siam) (Moore, Digest, vol. V, p. 5068)), in which the arbitrator awarded damages explicitly in order to place the estate of the injured party as far as possible in the same position as it would have been in without the unlawful act, which involved complicated calculations and valuations "to arrive at a probable figure for lost profits".

197/ P.C.I.J., Series A, No. 17, pp. 46-67.

compensation according to which the injured party was entitled to be re-established in the same situation which would, in all probability, have existed if the wrongful taking had not taken place. In brief, the Court applied a principle of full restitution in the literal and broad sense of restitutio in integrum, as distinguished from the technical and narrow sense in which the expression is sometimes used to indicate naturalis restitutio. According to the Court, full compensation could be achieved by different means. Whenever possible, one should apply naturalis restitutio or restitutio in integrum stricto sensu. Whenever and to the extent that such a remedy did not ensure full compensation (namely restitutio in integrum in the broad literal sense), one should resort to pecuniary compensation in such a measure as to cover any loss not covered thereby, up to the amount necessary for such full compensation.

(35) It is on the same principle that the Permanent Court of Arbitration decided the Lighthouses case. 198/ Considering the activity which was the object of the contract and the impossibility of assessing the value of the concession (at the time of expropriation) on the basis of the "residual amortization value of the buildings", the tribunal found the injured party to be entitled to compensation equivalent to the profits the company would have earned from the concession for the rest of the duration of the contract. This interpretation of the principle of full compensation seems to have depended, however, on the particular circumstances of the case. It depended notably, it seems, on the fact that the contract article contemplating the possibility of the "taking over" of the concession indicated that the indemnifiable damage should consist, in such eventuality, in "all compensation which may be determined by the parties or by arbitration in case of failure to agree". 199/ Within such a contractual context, any question with regard to compensation was bound to be settled by the discretionary power of the arbitral tribunal rather than on the basis of any objective legal principle. All that can be drawn from this case, therefore, is that the tribunal awarded an amount of compensation calculated on the basis of the capitalization of

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198/ Decision of 24/27 July 1956 (France v. Greece) (United Nations, Reports of International Arbitral Awards, vol. XII, pp. 155 et seq.).

199/ Ibid., pp. 299-350.

future profits, such sum representing the "value of the concession in 1928" (namely, the value which the Greek Government was contractually bound to pay for it if it exercised its agreed right of redemption).

(36) The same principle of full compensation was the basis of the decision handed down in 1963 in the Sapphire International Petroleums Ltd. v. National Iranian Oil Company (NIOC) case, 200/ in which the injured party obtained compensation for both the loss corresponding to the expenses incurred for the performance of the contract and the net lost profits. As regards the assessment of such lost profits, the arbitrator noted, however, that that was "a question of fact to be evaluated by the arbitrator"; and after considering "all the circumstances", including "all the risks inherent in an operation in a desolate region" and "the troubles - such as wars, disturbances, economic crises or slumps in prices - which could affect the operations during the several decades during which the agreement was to last", 201/ the arbitrator awarded compensation for loss of profits amounting to a sum corresponding to two fifths of the amount claimed by the company. In this case, while lucrum cessans was decidedly included in the compensation, the arbitrator did not indicate any preference of principle for one or the other of the possible methods of evaluation.

(37) Although the LIAMCO v. Government of Libya case 202/ concerned a lawful expropriation, with regard to which the arbitrator rejected the claim to naturalis restitutio, some considerations were made concerning "cases of wrongful taking of property". The arbitrator had no difficulty in admitting with the claimant that an internationally wrongful violation of a concession agreement "entitles Claimant in lieu of specific performance to full damages including damnum emergens and lucrum cessans". 203/ Again, however, nothing was specified with regard to the method by which lucrum cessans should, in such cases, be assessed. Something more seems to emerge from

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200/ Decision of 12 April 1977 (International Law Reports, vol. 35 (1967), pp. 136 et seq.).

201/ Ibid., pp. 187 and 189.

202/ Decision of 12 April 1977 (ibid. vol. 62 (1982), pp. 141 et seq.).

203/ Ibid., pp. 202-203.

AMINOIL v. Kuwait. 204/ Again, the expropriation was considered to be a lawful one. It was stated later, however, in connection with the issue of compensation for loss of profits, that the method of the Discounted Cash Flow (DCF), 205/ which was unsuitable for the calculation of lost profits compensation in a case of lawful take-over, might be adequate in a case of unlawful expropriation - this in view of the fact that the application of such a method would ensure, in a case of a wrongful taking affecting decisively the assets involved, a compensation globally apt to restore the situation that would have existed if the wrongful act had not been committed. A confirmation comes from AMCO Asia Corporation v. Indonesia 206/ a case of unlawful taking. After recalling the principle of full compensation as being inclusive of damnum emergens and lucrum cessans - the latter not to exceed the "direct and foreseeable prejudice" - the tribunal evaluated the lost profits on the basis of DCF, rendering thus more explicit what had been stated only incidentally in the AMINOIL case: namely, that DCF should be considered one of the most appropriate methods of evaluation of a going concern unlawfully taken. 207/

(38) The latter conclusion does not find confirmation, however, in the Amoco International Finance Corporation v. Iran case, partly decided by an award of 14 July 1987 by the Iran-United States Claims Tribunal, 208/ part of which is devoted precisely to the effects of lawfulness or unlawfulness on the standard of compensation. 209/ In evaluating the parties' contentions, the tribunal confirmed the distinction between lawful and unlawful expropriations, "since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the

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204/ Decision of 24 March 1982 (International Legal Materials, vol. XXI (1982), pp. 976 et seq.).

205/ Ibid., pp. 1034-1035.

206/ Decision of 20 November 1984 (Ibid., vol. XXIV (1985), pp. 1022 et seq.).

207/ Ibid. p. 1037, para. 271 of the award.

208/ Ibid., vol. XXVII (1988), pp. 1314 et seq.

209/ Ibid., pp. 81 et seq., paras. 189-206.

taking". 210/ The study of that case might suggest that the tribunal saw a certain discrepancy between the evaluation of lucrum cessans in the case of unlawful taking (such evaluation to be confined in any case to the profits lost up to the time of settlement), on the one hand, and the lost profits calculated on a DCF basis until the time originally set for the termination of the concession, on the other. The tribunal, however, does not go any further in the analysis of the discrepancy. It confines itself to the rejection of DCF as a method applicable to the case at hand. 211/ In Starret Housing 212/ on the other hand, the Tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits. In Phillips Petroleum Co. Iran v. Iran the tribunal stated:

> "The Tribunal believes that the lawful/unlawful taking distinction, which in customary international law flows largely from the Case Concerning the Factory at Chorzow (Claim for indemnity) (Merits), P.C.I.J. Judgment No. 13, Ser. A., No. 17 (28 September 1928), is relevant only to two possible issues: whether restitution of the property can be awarded and whether compensation can be awarded for any increase in the value of the property between the date of taking and the date of the judicial or arbitral decision awarding compensation. The Chorzow decision provides no basis for any assertion that a lawful taking requires less compensation than that which is equal to the value of the property on the date of taking." 213/

(39) In view of the divergences of opinion which exist with regard to compensation for lucrum cessans, the Commission has come to the conclusion that it would be extremely difficult to arrive in this respect at specific rules commanding a large measure of support. The relative uncertainty in the case-law discloses three questions which give rise to controversy, i.e.

(a) In what cases are loss of profits recoverable?

(b) Over what period of time are they recoverable?

(c) How should they be calculated?

210/ Ibid., p. 82, para. 192.

211/ Ibid., p. 105, para. 240.

212/ Starret Housing Corp. v. Islamic Rep. of Iran, (Case No. 24) 14 August 1987 AWD 314-24-1 (1/8/87).

213/ Phillips Petroleum Co. Iran v. Iran, (Case No. 39) 29 June 1989 AWD 425-39-2.

As regards the first question, it seems fairly clear that the problem arises with "going concerns" which have a profit-making capacity. The major uncertainty relates to the question whether loss of profits are recoverable for a lawful, as opposed to unlawful taking (this is the uncertainty reflected in the difference of emphasis in Amoco International Finance Corp. v. Iran as compared with the Phillips case). As regards the second question, the central question, again unsettled, is whether that period of time ends at the date of judgement or should be extended to the original termination date for the contract or concession which has been terminated. The third question raises the whole question of the method of calculation, in particular whether the DCF (Discounted Cash Flow) method is appropriate. The state of the law on all these questions is, in the Commission's view, not sufficiently settled and the Commission at this stage, felt unable to give precise answers to these questions or to formulate specific rules relating to them. It has therefore felt it preferable to leave it to the States involved or to any third party involved in the settlement of the dispute to determine in each case whether compensation for loss of profits should be paid. The decisive element in reaching a decision on this point is the necessity of ensuring full reparation of the damage as provided in article 6 bis.

Article 10

Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(a) an apology;

(b) nominal damages;

(c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Commentary

(1) While compensation is the main and central remedy resorted to following an internationally wrongful act, the study of the doctrine and practice of the law of State responsibility indicates that two further sets of consequences, functionally distinct from restitution in kind and compensation and both quite typical of international relations, must be taken into account. These consequences are the forms of reparation generally designated by the terms "satisfaction" and "guarantees of non repetition". They are dealt with in articles 10 and 10 bis respectively.

(2) The term "satisfaction" is used in article 10 and in much of the literature in a technical "international" sense as distinguished from the broader non-technical sense in which it is merely a synonym of reparation. It has thus moved away from its etymological meaning, even though it is precisely "in the first etymological meaning of the verb 'to satisfy' which is to fulfil, to settle what is owed" 214/ that the term recurs at times in the practice and the literature. 215/

(3) Although rather widely recognized, the distinction between satisfaction and compensation is not without problems. A minor difficulty is of course the confusion caused by the occasional use of the term "satisfaction" in the broad, non-technical sense referred to above. Another difficulty derives from the ambiguity of the two adjectives generally used to characterize the kinds of injury, damage or loss respectively covered by pecuniary compensation and satisfaction: "material" and "moral". The two adjectives however fail to give an exact picture of the areas of injury covered respectively by compensation and satisfaction.

(4) As made clear in the commentary to article 8, pecuniary compensation is intended to compensate not only material damage but also moral damage suffered

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214/ P.A. Bissonnette, op. cit. (note 123 above) p. 248.

215/ C. Dominice for example writes that "In fact, satisfaction is not a form of reparation, it is reparation that is one of the forms of satisfaction" ("La satisfaction en droit des gens", Mélanges Georges Perrin (Lausanne, Payot, 1984)).

by private nationals or agents of the offended State. 216/ Satisfaction on the other hand is normally understood to cover only the non-material damage to the State. 217/ This is the kind of injury which a number of authorities characterize as the moral injury suffered by the offended State in its honour, dignity and prestige and which is considered at times to be a consequence of any wrongful act regardless of material injury and independent thereof. According to some authors, one of the main aspects of this kind of injury would be actually that infringement of the State's right in which any wrongful act consists, regardless of any more specific damage. According to Anzilotti, for example:

> "... The essential element in inter-State relations is not the economic element, although the latter is, in the final analysis, the substratum; rather, it is an ideal element, honour, dignity, the ethical value of subjects. The result is that, when a State sees that one of its rights is ignored by another State, that mere fact involves injury that it is not required to tolerate, even if material consequences do not ensue; in

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216/ Even though situations are not infrequent in international jurisprudence concerning moral damage to human beings where the arbitrators have expressly qualified the award of a sum covering such damage as "satisfaction" rather than pecuniary compensation. Thus, in the well-known Janes case (Decision of 16 November 1925 (United Nations, Reports of International Arbitral Awards, vol. IV, pp. 82 et seq.)), the Mexico-United States General Claims Commission thought that "giving careful consideration to all elements involved ... an amount of ..., without interest, is not excessive as satisfaction for the personal damage caused the claimants by the non-apprehension and non-punishment of the murderer of Janes" (para. 26 of the decision (ibid., p. 90)). In the Francisco Mallén case, the same Commission, while awarding "compensatory damages" for the "physical injuries inflicted upon Mallén", decided that "an amount should be added as satisfaction for indignity suffered, for lack of protection and for denial of justice" (Decision of 27 April 1927 (ibid., vol. IV, pp. 173 et seq. at pp. 179-180)). The same Commission made an identical point in the Stephen Brothers case (Decision of 15 July 1927 (ibid., pp. 265 et seq.)). The tendency to use the concept of "satisfaction" with regard to situations such as these is clearly present also in the literature: see for instance J. Personnaz, op. cit. (note 99 above), pp. 197-198 and C.D. Gray, op. cit. (note 97 above) pp. 33-34.

217/ In this sense the expression "moral damage" is used, inter alia, by J.C. Bluntschli, Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt, 3rd ed. (Nördlingen, 1878); French trans. by C. Lardy, Le droit international codifié, 5th rev. ed. (Paris, 1895), p. 264; D. Anzilotti, op. cit. (note 99 above), p. 524; C. de Visscher, op. cit. (note 113 above), p. 119; C. Rousseau, op. cit. (note 181 above), p. 13; G. Morelli, op. cit. (note 99 above), p. 358.

> no part of human life is the truth of the well-known saying 'Wer sich Wurm macht er muss getreten werden' so apparent..." 218/

Less frequently, but perhaps significantly, the kind of injury in question is also indicated as "political damage", this expression being used, preferably in conjunction with "moral damage", in the above-mentioned sense of injury to the dignity, honour, prestige and/or legal sphere of the State affected by an internationally wrongful act. The expression used is notably "moral and political damage": a language in which it seems difficult to separate the "political" from the "moral" qualification. The term "political" is probably intended to stress the "public" nature acquired by moral damage when it affects more immediately the State in its sovereign quality (and equality) and international personality. In that sense the adjective may be useful in order better to discriminate between the "moral" damage to the State (which is exclusive of inter-State relations) from the "moral" damage more frequently referred to (at national as well as international level) in order to designate the non-material or moral damage to private parties or agents which affects the State, so to speak less immediately at the level of its external relations.

(5) In formulating paragraph 1 of article 10, the Commission did not find it necessary to go into the above terminological issues or the distinctions made in the literature between the various components of the moral damage to the State, particularly as injury to the State's dignity, honour and prestige and "legal" or "juridical" damage tend to be fused into a single "injurious effect". 219/ The all-embracing phrase "damage, in particular moral damage" is intended to convey the notion that the kind of injury for which satisfaction operates as a specific injury consists in any non-material damage suffered by a State as a result of an internationally wrongful act.

218/ D. Anzilotti, op. cit. (note 99 above), pp. 493-494 (emphasis added).

219/ Indeed the juridical injury - namely, the mere infringement of the injured State's right - is felt by that State as an offence to its dignity, honour or prestige. Paraphrasing Anzilotti one may say that in not a few cases the damage coincides with - and gets to consist essentially of - the very infringement of the injured State's right. A State, indeed, cannot tolerate a breach of its right without finding itself diminished in the consideration it enjoys - namely, in one of its most precious and politically most highly valued assets. (D. Anzilotti, op. cit. (note 99 above), p. 425.

(6) Like the corresponding provision of the draft articles on restitution in kind and compensation, paragraph 1 is couched in terms of an entitlement of the injured State. At the same time, the text acknowledges the rather exceptional character of this remedy by making it clear that satisfaction may be obtained "if and to extent necessary to provide full reparation". This phrase recognizes, on the one hand, that there may be circumstances in which no basis exists for granting satisfaction and, on the other hand, that the test in assessing a claim for satisfaction is the principle of full reparation. The following survey of the relevant international jurisprudence and diplomatic practice is intended to provide indications as to the circumstances in which satisfaction may be obtained.

(7) That satisfaction is an exceptional remedy clearly emerges from the awards rendered in the Miliani, 220/ Stevenson, 221/ Carthage and Manouba 222/ and

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220/ United Nations, Reports of International Arbitral Awards, vol. X, p. 59.

221/ Ibid., vol. IX, p. 506.

222/ Decisions of 6 May 1913 (France v. Italy). In the Manouba case, the arbitral tribunal declared:

> "... Whereas the capture could not be legitimized, either, by the regularity, relative or absolute, of these latter phases viewed separately.
>
> "On the application to condemn the Royal Italian Government to pay damages:
>
> "1. the sum of one franc for the affront to the French flag;
>
> "2. the sum of one hundred thousand francs as reparation for the moral and political injury resulting from the failure to observe ordinary international law and reciprocally binding conventions for Italy and for France.
>
> "And on the application to condemn the Government of the French Republic to pay the sum of one hundred thousand francs as a sanction and as reparation for the material and moral injury resulting from the breach of international law, notably the right of a belligerent to verify the status of individuals suspected of being enemy soldiers, found on board neutral trading vessels.

Lusitania 223/ cases. That the obligation to compensate the injured State for the material damage sustained is distinct from the obligation to provide satisfaction for other types of damages is equally apparent from a number of jurisprudential cases. A famous instance is that of the "I'm Alone", a Canadian vessel owned by United States nationals sunk by the United States Coast Guard. 224/ The Commissioners decided not to award any compensation for the loss of the vessel, but stated that

> "The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act: and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly".

"Whereas, in cases in which a Power has allegedly failed to fulfil its obligations, whether general or specific, towards another Power, a finding to this effect, particularly in an arbitral award, already constitutes a serious sanction;

"that such sanction is made heavier, where necessary, by the payment of damages for material losses;

"...

"... that ... generally speaking, the introduction of another pecuniary sanction seems to be superfluous and to go beyond the purpose of international jurisdiction;

"Whereas, in the light of the foregoing, the circumstances of the case cannot substantiate such additional sanction; that, without further consideration, there are, accordingly, no grounds for meeting the above-mentioned demands".

"..." (ibid., vol. XI, p. 475).

In the Carthage case an almost identical decision was taken by the same tribunal (ibid., vol. XI, pp. 460-461).

223/ Ibid., vol. VII, p. 39.

224/ Decisions of 30 June 1933 and 5 January 1935 (Canada v. United States of America) (ibid., vol. III, pp. 1609 et seq.).

Other examples include the Arends 225/ and Brower 226/ cases.

(8) In diplomatic practice, satisfaction has been claimed for various types of injurious behaviour including insults to the symbols of the State such as the national flag, 227/ violations of sovereignty or territorial integrity, 228/ attacks on ships or

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225/ In which the umpire stated that:

> "The damages consequent upon the detention of this vessel are necessarily small but it is the belief of the umpire that the respondent Government is willing to recognize its responsibilities for the untoward act of its officers ..." (ibid., Vol. X, p. 730).

226/ The case concerned a United States national who had bought six small islands of the Fiji archipelago. For not having recognized Brower's rights when it acquired sovereignty over the Fiji islands, the United Kingdom was sentenced to the payment of one shilling. The Great Britain-United States Arbitral Tribunal, referring to a report of the British Colonial Secretary according to which:

> "These are six small islands of the Ringgold group. They are mere islets with a few coconut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them",

decided as follows:

> "In these circumstances, we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages." (Decision of 14 November 1923 (ibid., vol. VI, pp. 109 et seq.).

227/ Examples are the Magee case (1874) (Whiteman, Damages, vol. I, p. 64), the Petit Vaisseau case (1863) (ibid., 2nd series, vol. III, No. 2564) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, op. cit. (note 143 above), pp. 186-187).

228/ A well known example is that of the Rainbow Warrior (United Nations, Reports of International Arbitral Awards, vol. XIX, pp. 197 et seq.) on which R. Pinto, "L'affaire du 'Rainbow Warrior': A propos de la sentence arbitrale du 30 avril 1990 (Nouvelle-Zélande c. France)" Journal de droit international, 1990, pp. 851 et seq.; J. Charpentier, "L'affaire du 'Rainbow Warrior'", AFDI, 1985, pp. 210 et seq., D.W. Bowett, "Treaties and State responsibility" in Le droit international au service de la paix, de la justice et du développement - Mélanges Michel Virally, Paris, Pedone, 1991, pp. 137-145 and G. Palmisano, "Sulla decisione arbitrale relativa alla seconda fase del caso 'Rainbow Warrior'", Rivista di diritto internazionale, LXXIII (1190), pp. 874-910.

aircraft, 229/ ill treatment of, or attacks against heads of State or Government or diplomatic or consular representatives or other diplomatically protected persons 230/ and violations of the premises of embassies or

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Another example of special interest since it involves an international organization, the League of Nations, concerns the military action carried out in Bulgarian territory by Greece in 1925 (League of Nations, Official Journal, 7th year, No. 2 (February 1926), pp. 172 et seq.). Mention may also be made of the kidnapping in Argentina and the deportation to Israel of Adolf Eichman, even though the requests of the Argentinian Government were not met (Whiteman, Digest, vol. V, p. 210).

229/ Examples include the Panay incident (1937) between Japan and the United States (L. Oppenheim, International Law: A Treatise, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co, 1955), p. 354, note 2); the attack carried out in 1961 against a Soviet aircraft transporting President Breznev by French fighter planes over the international waters of the Mediterranean (Chronique des faits internationaux, Revue générale de droit international public, vol. 65 (1961), pp. 603 et seq.); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (ibid., vol. 84 (1980), pp. 1078-1079.

230/ Examples taken from the Italian diplomatic practice are to be found in La Prassi Italiana di Diritto Internazionale, 1st series, vol. II, Nos. 1014 and 1017 and ibid., 2nd series, vol. III Nos. 2559, 2563 and 2576. Mention may also be made in this context of the killing in 1919 of a French soldier on guard at the French Embassy in Berlin (P. Fauchille, Traité de droit international public (Paris, 1922), vol. I, part. I, p. 528) and of a 1924 incident in which the Vice-Consul of the United States in Tehran was killed by the crowd for having tried to take photographs of a religious ceremony (Whiteman, Damages, vol. I, pp. 732-733). Also relevant is the case concerning the killing in 1923, near Janina, of General Tallini, an Italian officer commissioned by the Conference of Ambassadors to assist in the delimitation of the frontier between Greece and Albania. Greece, held responsible for the murder, received particularly onerous requests from the Conference of Ambassadors (see C. Eagleton, op. cit. (note 143 above), pp. 187-188).

More recent examples are the incidents that took place during a visit of President Georges Pompidou of France in the United States in 1970 (Chronique des faits internationaux, Revue générale de droit international public, vol. 75 (1971) pp. 177 et seq., at p. 181) and the searching of the luggage of President Soleiman Frangie of Lebanon at New York airport in 1974 (ibid., vol. 79 (1975), pp. 810-811). For similar episodes, see F. Przetacznik, "La responsabilité internationale de l'Etat à raison des préjudices de caractère moral et politique causés à un autre Etat", Revue générale de droit international public (Paris), vol. 78 (1974), pp. 951 et seq.

consulates (as well as the residences of members of foreign diplomatic missions). 231/ Claims for satisfaction have also been put forward in cases where the victims of an internationally wrongful act were private citizens of a foreign State. 232/

(9) Satisfaction is not defined only on the basis of the type of injury with regard to which it operates as a specific remedy, it is also identified by the typical forms it assumes, of which *paragraph 2* of article 10 provides a non-exhaustive list. "Apology", mentioned in *subparagraph (a)* encompasses regrets, excuses, saluting the flag, etc. It is mentioned by many writers and occupies a significant place in international jurisprudence. Examples are the

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Worthy of special mention since it concerns an international organization is the case relating to the killing in 1948, in Palestine, of Count Bernadotte while he was in the service of the United Nations (Whiteman, *Digest*, vol. 8, pp. 742-743).

231/ Examples include the attack by demonstrators, in 1851, of the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, pp. 811 et seq., at p. 812), the violation by two Turkish officials, in 1883, of the residence of the Italian Consul in Tripoli (*La Prassi Italiana di Diritto Internazionale*, 1st series, vol. II, No. 1018) and the failed attempt of two Egyptian policemen, in 1888, to violate the Italian Consulate at Alexandria (ibid., 2nd series, vol. III, No. 2558).

More recently, apologies and expressions of regret followed demonstrations in front of the French Embassy in Belgrade in 1961 (Chronique des faits internationaux, *Revue générale de droit international public*, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (ibid., vol. 69 (1965), pp. 130-131) and in Karachi in 1965 (ibid., vol. 70 (1966), pp. 165-166).

232/ A well-known case concerns the Italian protests over the lynching in 1891 of 11 Italians who had been imprisoned further to the murder of the chief of police of New Orleans. The United States deplored the occurrence and awarded Italy a sum of 125,000 lire, to be distributed by the Italian Government to the families of the victims. (*La Prassi Italiana di Diritto Internazionale*, 2nd series, vol. III, No. 2571).

Another example concerns the murder in 1908 of the Reverend Labaree, a United States missionary; the Persian Government paid a sum of US$ 30,000 and punished the Kurds who were responsible for the murder (Whiteman, *Damages*, vol. I, pp. 725 et seq.).

"I'm Alone", 233/ Kellet 234/ and "Rainbow Warrior" 235/ cases. In diplomatic practice, insults to the symbols of the State or Government, 236/ attacks against diplomatic or consular representatives or other diplomatically protected agents, 237/ or against private citizens of a foreign State 238/ have often led to apologies or expressions of regret,

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233/ See note 224 above.

234/ Decision of 20 September 1897 (United States of America v. Siam). The arbitral commission decided that "His Siamese Majesty's Government shall express its official regrets to the United States Government" (Moore, Digest, vol. II, pp. 1862 et seq., at p. 1864).

235/ See footnote 228 above. In his ruling, the Secretary-General of the United Nations decided that France should present formal apologies to New Zealand.

236/ In March 1949, a sailor in the United States Navy who was on leave in Havana climbed on to the statue of José Marti, a hero of Cuban independence. Following the Cuban Government's protest, the United States Ambassador placed a wreath of flowers at the foot of the statue and read a declaration of regrets (Chronique des faits internationaux, Revue générale de droit international public, vol. 71 (1967), p. 775).

Cases involving insult to the national flag have been relatively frequent during the period preceding the Second World War. A form of satisfaction which is typical of those cases consists in a ceremony during which the offending State salutes the flag of the offended State.

237/ Examples are to be found in footnote 230 above.

238/ Examples are to be found in footnote 232 above.

as have also attacks on diplomatic and consular premises 239/ or on ships. 240/ Forms of satisfaction such as the salute to the flag or expiatory missions seem to have disappeared in recent practice. Conversely requests for apologies or offers thereof seem to have increased in importance and frequency.

(10) It should be stressed that the resonance effect of public apologies can be achieved not only by involving the press or other mass media. It can be pursued even more effectively by the choice of the level of the wrongdoing State's organization from which the apologies emanate. 241/ In this context, mention should be made of a form of satisfaction which has a place both in literature 242/ and in international

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239/ Following the looting of the French Embassy in Saigon by Vietnamese students in 1964, the Government of Viet Nam issued a communiqué to the local press presenting apologies and suggesting that the damage suffered by persons and property be assessed in order to allow the payment of compensation. (Chronique des faits internationaux, Revue générale de droit international public, vol. 68 (1994), p. 944). When, in 1967, attempts were made to blow up the Yugoslav Embassy in Washington, D.C., and the Yugoslav Consulates in New York, Chicago and San Francisco, the United States Secretary of State presented his country's apologies to the Yugoslav Ambassador by means of a press statement (ibid., vol. 70 (1967), p. 775). The Chinese Government requested public excuses from the Indonesian Government for the looting in 1966 of the Chinese Consulates at Jakarta, Macassar and Medan during anti-communist riots (ibid., vol. 70 (1967), pp. 1067-1068). The same Government requested and obtained public excuses following incidents at Ulan Bator railway station, where Chinese diplomats and nationals were ill-treated by the local police (ibid., vol. 71 (1967) pp. 1067-1068).

240/ Examples are the Panay incident referred to in footnote 229 above and the incident including the damaging of the Stark by an Iraqi missile in 1987. In the latter incident, the President of Iraq immediately wrote to the President of the United States. He explained the attack as an accident and expressed his "heartfelt condolences" for the death of the United States sailors who had been killed, adding that "sorrow and regrets are not enough".

241/ For example, following the attempt on the life and the physical injury of the United States Ambassador in Tokyo in 1964, the Prime Minister and the Foreign Minister of Japan presented apologies to the United States Ambassador and the Minister of the Interior resigned from office. In addition, Emperor Hirohito sent a delegate of his own to join the members of the Government in the presentation of apologies.

242/ G. Morelli, op. cit. (note 99 above), p. 358 and C.D. Gray, op. cit. (note 97 above), p. 42.

jurisprudence, 243/ namely recognition by an international tribunal of the unlawfulness of the offending State's conduct.

(11) Another form of satisfaction, dealt with in subparagraph (b) of paragraph 2, is that of nominal damages through the payment of symbolic sums. Several examples are to be found in international jurisprudence. 244/

243/ In the "Manouba" case for instance, the arbitral tribunal *inter alia* declared that:

> "... in cases in which a Power has allegedly failed to fulfil its obligations, whether general or specific, towards another Power, a finding to this effect, particularly in an arbitral award, already constitutes a serious sanction" (loc. cit., footnote 222 above).

In the "Carthage" case, an almost identical decision was made by the same tribunal.

Even more significant, in the same sense, is the judgment of the ICJ in the Corfu Channel case (Merits). Addressing the question:

> "Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946, and is there any duty to give satisfaction",

the Court stated:

> "... that by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction." (I.C.J. Reports, 1949, p. 12 and 36).

244/ In the Arends case (see note 225 above), the umpire of the Netherlands - Venezuelan Mixed Claims Commission indicated satisfaction as consisting in the expression of regrets by the payment of $100. Other examples are the Brower case (see note 226 above) and the Lighthouses case, in which the Permanent Court of Arbitration, referring to one of the claims of France against Greece, stated:

> "The Tribunal considers the basis for this claim sufficiently proven, so that only the amount of the damage sustained by the Company needs to be established. In view of the inconsistency of the French claim, which fixed the amount of the damage at 10,000 francs Poincaré and then declared that the amount could not be set in figures, the Tribunal, while recognizing the validity of the claim, can only award a token indemnity of 1 franc." (United Nations, Reports of International Arbitral Awards, vol. XII, p. 216).

(12) Much more complex is the form of satisfaction dealt with in subparagraph (c) namely "damages reflecting the gravity of the infringement". Such damages are of an exceptional nature as indicated by the phrase "in cases of gross infringement of the rights of the injured State". They are given to the injured party over and above the actual loss, when the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party. 245/ This definition, brings to light the specific function of satisfaction vis-à-vis restitution in kind and compensation. This aspect is dealt with in the latter part of this commentary.

(13) The international jurisprudence of recent years provides an interesting example of "damages reflecting the gravity of the infringement" namely the case of the Rainbow Warrior, 246/ involving the sinking of a ship in Auckland harbour in 1985 by agents of the French security services who had used false Swiss passports to enter New Zealand. New Zealand demanded that France present a formal apology and pay US$ 10 million - a sum which exceeded by far the value of the material loss sustained. France acknowledged responsibility but refused to pay the considerable amount claimed by New Zealand by way of indemnification. The case was finally submitted to the Secretary-General of the United Nations, who inter alia decided that France should pay a sum of US$ 7 million to New Zealand.

(14) The last of the forms of satisfaction listed in paragraph 2 concerns the sanctioning of responsible officials dealt with in subparagraph (d). This mode of satisfaction is emphasized in literature 247/ and has frequently been requested and granted in diplomatic practice in the form of the disavowal

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245/ In common law, this type of damages is known as "exemplary damages".

246/ See note 228 above.

247/ See for instance J.C. Bluntschli, op. cit. (note 217 above), p. 265 and P.A. Bissonnette, op. cit. (note 103 above), p. 24.

(désaveu) of the action of its agent by the wrongdoing State, 248/ the setting up of a commission of inquiry and the punishment of the responsible individuals. 249/ A variant is provided by the Rainbow Warrior case in which the Secretary-General decided that the two responsible French agents should be handed over to France and later be restricted to the island of Hao for at least three years.

(15) The Commission is aware that extensive application of this form of satisfaction might result in undue interference in the internal affairs of States. It has therefore limited the scope of application of the subparagraph to criminal conduct whether from officials or private parties and to serious misconduct of officials.

(16) The opening phrase of paragraph 2 makes it clear that the paragraph provides an exhaustive list of the forms of satisfaction, which may be combined. A case in point is the Rainbow Warrior case, 250/ in which the Secretary-General ordered formal apologies, damages and restrictions on the freedom of movement of the responsible officials.

(17) The specificity of satisfaction as a consequence of an internationally wrongful act manifests itself not only in the types of injury with regard to

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248/ For cases of désaveu during the period from 1850 to 1939, see P.A. Bissonnette, op. cit. (note 103 above), pp. 104 et seq.

A case of désaveu involved Bolivia and the United States. Following the publication in the American magazine Time in March 1959 of an article attributing to the spokesman of the United States Embassy in La Paz remarks which were considered to be offensive to Bolivia, the State Department of the United States immediately corrected those statements (Whiteman, Digest, vol. V, pp. 169-170).

249/ Punishment of the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (see note 230 above) and in the case of the killing of two United States officers in Tehran (Chronique des faits internationaux, Revue générale de droit international public, vol. 80, p. 257).

250/ See note 228 above. According to G. Palmisano, the confinement of the two French agents should be understood (contrary to the scarce doctrine on the subject) not as satisfaction in the proper sense but rather as the result of an ex aequo et bono settlement of a "political" dispute between the parties, a distinct dispute from the legal dispute over the French liability for the attack on the "Rainbow Warrior" (op. cit. (note 228 above), pp. 900 and 901).

which it operates and in the particular forms which it takes but also, and even more importantly, in the specific function which it performs.

(18) A school of thought 251/ as well as some jurisprudence and practice tend to attribute to satisfaction as a form of reparation an afflictive nature - distinct from compensatory forms of reparation such as restitutio and compensation. Of course the distinction is not an absolute one. Even such a remedy as reparation by equivalent (not to mention restitution in kind) performs, in the relations between States as well as in inter-individual relations, a role that cannot be deemed to be purely compensatory. Though its role is certainly not a punitive one, it does perform the very general function of dissuasion from, and prevention of, the commission of wrongful acts.

(19) The distinction between satisfaction, on the one hand, and restitutio and compensation, on the other, does not exclude the possibility that two of those forms, or all three, may come into play together in order to ensure a combined, complete reparation of the material as well as the moral/political/juridical injury. In fact, both in jurisprudence and in diplomatic practice, satisfaction is frequently accompanied by compensation.

(20) The autonomous nature of satisfaction does not, on the other hand, prevent it from often appearing to be absorbed into, or even confused with, the more rigorously compensatory remedies. It may have been so, for example, in the Rainbow Warrior case, where both the sum claimed by New Zealand and the sum awarded by the Secretary-General of the United Nations exceeded by far the

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251/ These writers include J.C. Bluntschli, op. cit. (note 217 above), p. 426; C. Eagleton, op. cit. (note 143 above), pp. 190-191; H. Lauterpacht "Règles générales du droit de la paix", Recueil des cours ... 1937 - IV (Paris, 1938) vol. 62, p. 350; J. Personnaz, op. cit. (note 99 above), pp. 317-318; F.V. Garcia Amador, Sixth report (Yearbook ... 1961, document A/CN.4/134 and Add.1), para. 76; and G. Morelli, op. cit. (note 99 above), p. 358.

Satisfaction is however considered to be purely reparatory (in the sense that it should have no consequence beyond what in internal law is generally provided for as a consequence of a civil tort) by G. Ripert, "Les règles du droit civil applicables aux rapports internationaux", Recueil des cours ... 1933-II (Paris), vol. 44, p. 622; P.A. Bissonnette, op. cit. (note 103 above), p. 25; B. Cheng, General Principles of Law as Applied by International Courts and Tribunals (London, Stevens, 1953), pp. 236-237; E. Jimenez de Arechaga, op. cit. (note 114 above), p. 571, and C. Dominice, op. cit. (note 215 above), p. 118.

value of the material loss. Other examples include the case concerning the lynching of 11 Italians in New Orleans 252/ and the Labaree case. 253/ One may doubt, at first sight, whether those instances involved satisfaction stricto sensu. The element of satisfaction is, however, equally perceptible, either because one or more forms of satisfaction had been requested and obtained by the offended State or because the amount of the compensation exceeded to a greater or lesser degree the extent of the material loss. And there are instances where the presence of satisfaction in some form is suggested by admissions made by the offending State.

(21) The Commission, while agreeing on the content and formulation of the provisions of article 10, did not find it necessary to pronounce itself on the question of whether an afflictive nature should be attributed to satisfaction as a form of reparation, a question on which doctrinal opinions are divided.

(22) It was argued that the afflictive nature of satisfaction would contravene the principle of the sovereign equality of States and was not compatible either with the composition or with the structure of a "society of States" on the grounds that:

(a) punishment or penalty does not "become" persons other than human beings, and particularly sovereign States; and

(b) the imposition of punishment or penalty within a legal system presupposes the existence of institutions impersonating, as in national societies, the whole community, no such institutions being available or likely to come into being soon - if ever - in the "society of States".

(23) On the other hand, it was maintained that the very absence, in the "society of States", of institutions capable of performing such "authoritative" functions as the prosecution, trial and punishment of criminal offences committed by States makes even more necessary the resort to remedies susceptible of reducing, albeit in a very small measure, the gap represented by the absence of such institutions. The afflictive nature of satisfaction, according to this view, was not in contrast with the sovereign equality of the States involved. It was also considered that satisfaction is a matter of

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252/ See note 232 above.

253/ Ibid.

atonement. 254/ To confine the consequences of any international delict (whatever its gravity) to restitution in kind and compensation would mean to overlook the necessity of providing some specific remedy - having a preventive as well as an afflictive function - for the moral, political and juridical wrong suffered by the offended State or States in addition to, or instead of, any amount of material damage.

(24) The Commission finds it all the more important to recognize the positive function of satisfaction in the relations among States as it is precisely by resorting to one or more of the various forms of satisfaction that the consequences of the offending State's wrongful conduct can be adapted to the gravity of the wrongful act. This conclusion is of considerable importance as a matter of both codification and progressive development in this field.

(25) On the other hand, the Commission also finds it important to draw the lessons of the diplomatic practice of satisfaction which shows that abuses on the part of injured or allegedly injured States are not rare. Powerful States have often managed to impose on weaker offenders excuses or humiliating forms of satisfaction incompatible with the dignity of the wrongdoing State and with the principle of equality. The need to prevent abuse has been stressed by a number of authors. 255/ It underlies paragraph 3 of article 10 which, by making it clear that demands that would impair the dignity of the wrongdoing State are unacceptable, provides an indispensable indication of the limits within which a claim to satisfaction in one or more of its possible forms should be met by such a State.

254/ In the words of G. Morelli, op. cit. (see note 99 above), p. 358, "Satisfaction is in some ways analogous to a penalty, which also fulfils a function of atonement. Again, satisfaction, like a penalty, is afflictive in character in that it pursues an aim in such a way that the subject responsible undergoes harm. The difference is that, while a penalty is harm inflicted by another subject, in satisfaction the harm consists of a particular kind of conduct by the subject who is responsible - conduct which constitutes, as in other forms of reparation, the content of the subject's obligation."

255/ Including J.C. Bluntschli, op. cit. (note 217 above), pp. 268-269; A.J.P. Tammes, "Means of redress in the general international law of peace", Essays on the Development of the International Legal Order (Alphen aan den Rijn, Sijthoff and Noordhoff, 1980), pp. 7-8; J. Personnaz, op. cit. (note 99 above), p. 289, and B. Graefrath, op. cit. (note 96 above) p. 101.

Article 10 bis

Assurances and guarantees of non-repetition

The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

Commentary

(1) The study of practice and the literature shows that the consequences of an internationally wrongful act may include guarantees against its repetition. This particular consequence is however generally dealt with in the framework of satisfaction or other forms of reparation. 256/ It is of course true that all remedies - whether afflictive or compensatory - are themselves more or less directly useful in avoiding repetition of a wrongful act and that satisfaction in particular can have such a preventive function, especially in two of its forms, namely damages reflecting the gravity of the infringement, dealt with in paragraph 1 (c) of article 10 and disciplinary action against, or punishment of, officials responsible for the wrongful act, dealt with in paragraph 1 (d) of the same article. 257/ Yet assurances and guarantees of non-repetition perform a distinct and autonomous function. Unlike other

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256/ According to I. Brownlie, for example, the objects of satisfaction are three and are often cumulative. These are "apologies or other acknowledgement of wrongdoing by means of a salute to the flag or payment of an indemnity, the punishment of the individuals concerned and the taking of measures to prevent a recurrence of the harm" (op. cit. (note 159 above), p. 208). P.A. Bissonette similarly observes that "a demand for security for the future ... must be considered as one of the forms of satisfaction." (op. cit. (note 103 above), p. 121). See also B. Graefrath (op. cit. (note 96 above), p. 87) and F.V. Garcia Amador, Principios de derecho internacional que rigen al responsabilidad - Analisis critico de la concepcion tradicional (Madrid, 1963), pp. 447-453.

257/ In the words of J. Personnaz:

> "... the effect of pecuniary indemnification may be to encourage States to take the necessary measures in future to avoid a return to such a situation ... The implicit intention of such indemnification, which may or may not be compensatory, may include the idea that, by means of such penalties, the delinquent government may be induced to improve its administration of justice and give the claimant the assurance that such breaches and injustice in regard to its citizens will be avoided in the future." (op. cit. (note 99 above), p. 325). See also F.V. Garcia Amador, Sixth report on international responsibility (Yearbook ... 1961, vol. II, document A/CN.4/134 and Add.1, para. 145).

forms of reparation which seek to re-establish a past state of affairs, they are future-oriented. They thus have a preventive rather than remedial function. They furthermore pre-suppose a risk of repetition of the wrongful act. Those features make them into a rather exceptional remedy, which, in the view of the Commission, should not be automatically available to every injured State, particularly in the light of the broad meaning of that term under article 5 of Part Two of the draft. In this context, the question arises whether the injured State's entitlement to guarantees of non-repetition bears a relationship to the nature of the obligation breached and the gravity of the wrongful act. Such guarantees might be of special relevance in the case of violations of obligations deriving from peremptory norms of international law. 258/ The Commission intends to address this issue when it applies itself to the study of the consequences of crimes.

(2) A request for safeguards against repetition suggests that the injured State is seeking to obtain from the offender something additional to and different from mere reparation, the re-establishment of the pre-existing situation being considered insufficient. For example, following demonstrations against the United States Embassy in Moscow in February 1965 (less than three months after those of November 1964), the President of the United States affirmed that "... The United States Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between States. Expressions of regret and compensation are no substitute for adequate protection." In other words, the injured State demands guarantees against repetition because it feels that the mere restoration of the normal, pre-existing situation does not protect it satisfactorily.

(3) With regard to the kind of guarantees that may be requested, international practice is not univocal. The injured State usually demands either safeguards against the repetition of the wrongful act without any

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258/ B. Graefrath observes that:

"In all cases where continuation or repetition of a violation may be feared and particularly if violations of obligations are concerned which are arising from jus cogens norms, the claim for satisfaction is directed to measures to be taken that would forestall continuation or repetition of the wrongful conduct that would prevent such a disturbance of peaceful international cooperation in future ..." (op. cit. (note 96 above), p. 87).

specification 259/ or, when the wrongful act affects its nationals, that a better protection of the persons and property be ensured. 260/ In both cases, the wrongdoing State would appear to be placed under an obligation of result. In the face of the injured State's demand for guarantees, the choice of the measures most apt to achieve the aim of preventing repetition remains with the wrongdoing State.

(4) It is however possible that the injured State ask the wrongdoing State to adopt specific measures or act in certain ways considered to be apt to avoid repetition. In such a case, the wrongdoing State would seem to find itself under an obligation of conduct. Three possibilities are to be envisaged here: the injured State may (1) demand formal assurances from the wrongdoing State that it will in future respect given rights of the injured State or that it will recognize the existence of a given situation in favour of the injured

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259/ Examples include the Dogger Bank incident between the United Kingdom and Russia in 1904, in which the United Kingdom requested, among other things, "security against the recurrence of such intolerable incidents." (Martens, Nouveau Recueil, 2nd series, vol. XXXIII, p. 642) and the four cases concerning the visitation and search of American merchant vessels by armed cruisers of Spain on the high seas off the eastern coast of Cuba, following which the United States declared that it expected from Spain "a distinct assurance against their repetition" (Moore, Digest, vol. II, pp. 903 et seq., at pp. 903 and 907).

Reference is also made to the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General at Jakarta, in which the Chinese Deputy Minister for Foreign Affairs requested, among other measures, a guarantee that such incidents would not be repeated in the future (Chronique des faits internationaux in Revue générale de droit international public vol. 70 (1966), p. 1013). Another instance is the attack on an Israeli civil aircraft carried out in Zurich on 18 February 1969 by four members of the Popular Front for the Liberation of Palestine, following which the Swiss Government delivered formal notes of protest to the Governments of Jordan, Syria and Lebanon condemning the attack and urging the three Governments to take steps "to prevent any new violations of Swiss territory". (Moore, Digest, vol. VI, pp. 345-346).

260/ Such assurances were given for instance in the Doane case (1886) in which Mr. E. T. Doane, an American missionary in the Philippines, who had protested against the seizure by the Spanish authorities of certain lands belonging to the mission, was arrested and deported to Manila; following the protest by the United States Government, "the Spanish Government endeavoured in a measure to repair the wrong it had done by restoring Mr. Doane to the scene of his labours and by repeating its assurances with reference to the protection of the missionaries and their property" (Moore, Digest, vol. VI, pp. 745-746).

State; 261/ (2) ask the wrongdoing State to give specific instructions to its agents; 262/ or (3) ask the wrongdoing State to adopt a certain conduct considered to be apt to prevent the creation of the conditions which

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261/ Examples include the 1893 controversy between France and Siam in which France demanded that Siam recognize its territorial claim on the left bank of the Mekong (Martens Nouveau Recueil, 2nd series, vol. XX, pp. 160 et seq.); the 1901 case of the Ottoman post offices, in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory (Chronique des fait internationaux, in Revue générale de droit international public, vol. 8 (1901), pp. 777 et seq., in particular pp. 788 and 792); the 1907 "Constitución" case in which Uruguay requested that the Government of Argentina make a declaration to the effect that it had no intention of ignoring the jurisdiction which the Republica Oriental had, as a neighbouring and bordering country, over the Rio de la Plata (ibid., vol. 15 (1908), p. 318) and the case of a French packet-boat illegally detained in 1894 by the Ottoman authorities, in which, following French protests, those authorities promised that in future, the treaty provisions guaranteeing the inviolability of the persons and of the domicile of French nationals in the Orient would be better respected (ibid., vol. 2 (1895), pp. 623-624).

262/ These example would not necessarily all represent what would be "appropriate" by today's standards (see para. (5) below). Examples include the case of the Allianca, a United States mail steamship fired on by a Spanish gunboat off the coast of Cuba in 1895, in which the United States insisted that "immediate and positive orders be given to Spanish naval commanders not to interfere with legitimate American commerce passing through that channel and prohibiting all acts wantonly imperilling life and property lawfully under the flag of the United States" (Moore, Digest, vol. II., pp. 908-909); the case of the Herzog and the Bundesrath, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war (Martens, Nouveau Recueil, 2nd series, vol. XXIX, pp. 456 et seq., and p. 486); and the Jova case, concerning the pillage of the estate of an American citizen by Spanish troops in 1896, in which the United States called for "stringent orders to prevent the recurrence of such acts of theft and spoliation" (Moore, Digest, vol. VI, p. 910).

had allowed the wrongful conduct to take place, 263/ such conduct consisting, for instance, in the adoption or abrogation by the wrongdoing State of specific legislative provisions. 264/ Recent practice does not record explicit demands to modify or issue legislation. Similar requests are however made by international bodies. For example, it is frequent that ad hoc international bodies request States responsible for violations of human rights to adapt their legislation in order to prevent the repetition of violations. These requests include those by the Human Rights Committee in its decisions on individual complaints. In the Torres Ramirez case, for instance the

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263/ In the Trail Smelter case, for instance, the arbitral tribunal, in deciding on question No. 3 contained in article III of the Convention of 15 April 1935 between the United States of America and Canada (League of Nations, Treaty Series, vol. CLXII, p. 75) and reading as follows:

> "(3) In the light of the answer to the preceding question, what measures or regimes, if any, should be adopted or maintained by the Trail Smelter?"

mentioned specifically a series of measures (at first provisional and later definitive) apt to "prevent future significant fumigations in the United States" (United Nations, Reports of International Arbitral Awards, vol. III., pp. 1934 et seq.).

264/ Examples of explicit demands to modify or issue legislation include the 1886 Cutting case in which the United States, following the conviction in Mexico, in accordance with the Mexican legislation then in effect, of an American national for having published in the United States an article considered to be defamatory of a Mexican citizen, demanded that the legislation in question be modified - which was subsequently done (J. Dumas, "La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers", Recueil des cours ..., 1931-II, vol. 36, pp. 189-190); the case of the lynching of Italian nationals in Erwin, Mississippi, in 1901, in which Italy asked the United States to modify the law concerning the jurisdiction of federal courts which in practice prevented the punishment of the authors of crimes against foreigners (Moore, Digest, vol. VI, pp. 848-849); and the Alabama case, in which United States protests led Great Britain to modify the 1819 Act by the Act of 9 August 1870, which made it a statutory offence to build in British territory any ship intended for a belligerent, authorized the detention of any suspect ship and required any ship that had infringed British neutrality to hand over any prizes of war which it had brought into a British port (N. Politis, La justice internationale (Paris 1924), p. 41).

Committee, after ascertaining that Uruguayan law was not in conformity with the International Covenant on Civil and Political Rights, came to the following conclusion:

> "The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future" 265/

(5) On the basis of the above analysis, it appears that assurances and guarantees of non-repetition are a sui generis remedy to be distinguished from satisfaction and other forms of compensation. The text adopted by the Commission provides that the injured State is entitled, where appropriate, to obtain from the wrongdoing State assurances or guarantees of non-repetition. It therefore recognizes that the wrongdoing State is under an obligation to provide such guarantees subject to a demand from the injured State and when circumstances so warrant. Circumstances to be taken in consideration include the existence of a real risk of repetition and the seriousness of the injury suffered by the claimant State as a result of the wrongful act. The phrase "where appropriate" makes it clear that it will be for the judge (or other third party called upon to apply the rule) to determine if the conditions for the granting of what the Commission considers as an exceptional remedy are met and also to deny abusive claims which would impair the dignity of the wrongdoing State.

265/ Decision of 23 July 1980, paragraph 19 (Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40 (A/35/40, p. 126); other examples include the Lanza case, decisions of 3 April 1980, para. 17 (ibid., p. 119) and the Dermit Barbato case, decision of 21 October 1982, para. 11 (ibid., Thirty-eighth Session, Supplement No. 40 (A/38/40), p. 133).

CHAPTER V

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction 266/

336. The Commission included the topic "The law of the non-navigational uses of international watercourses" in its programme of work at its twenty-third session (1971), in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970.

337. The work begun by the three previous Special Rapporteurs was continued by Mr. Stephen C. McCaffrey, who was appointed by the Commission as Special Rapporteur on the topic at its thirty-seventh session (1985).

338. The Commission, from its thirty-seventh (1985) to its forty-third (1991) sessions received seven reports from the Special Rapporteur on the topic. 267/

339. At its forty-third session the Commission adopted on first reading an entire set of draft articles on the topic, 268/ which was transmitted, in accordance with articles 16 and 21 of the Commission's Statute, through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1993.

266/ For a fuller statement of the earlier historical background as well as a more detailed account of the Commission's work on the topic, see Yearbook ... 1985, vol. II (Part Two), pp. 68-71, paras. 268-278 and Yearbook ... 1989, vol. II (Part Two), pp. 122-124, paras. 621-636.

267/ For the seven reports see Yearbook ... 1985, vol. II (Part One), p. 87, document A/CN.4/393; Yearbook ... 1986, vol. II (Part One), p. 87, document A/CN.4/399 and Add.1 and 2; Yearbook ...1987, p. 15, document A/CN.4/406 and Add.1 and 2; Yearbook ... 1988, p. 205, document A/CN.4/412 and Add.1 and 2; Yearbook ... 1989, p. 91, document A/CN.4/421 and Add.1 and 2; document A/CN.4/427 and Corr.1 and A/CN.4/427/Add.1; and A/CN.4/436 and Corr.1 to 3.

268/ For the articles adopted on first reading see, The report of the International Law Commission on the work of its forty-third session, (Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10) (A/46/10), pp. 161-172.

340. At its forty-fourth session (1992), the Commission appointed Mr. Robert Rosenstock, Special Rapporteur for the topic. [269]

B. Consideration of the topic at the present session

341. At the present session, the Commission considered the Special Rapporteur's first report (A/CN.4/451) at its 2309th, 2311th to 2314th and 2316th meetings held between 18 June and 6 July 1993. The Commission also had before it the comments and observations on the draft articles received from Governments (A/CN.4/447 and Add.1-5).

342. In his report the Special Rapporteur analysed the written comments and observations received from Governments and made some changes in the articles adopted on first reading. [270] He raised two issues of a general character, namely whether the eventual form of the articles should be a convention or model rules, and the question of dispute settlement procedure. He also examined articles 1 to 10 of Parts I and II of the topic.

343. At the conclusion of the debate, the Commission at its 2316th meeting, referred articles 1 to 10 to the Drafting Committee. The Drafting Committee devoted two meetings to the articles. Its report (A/CN.4/L.489) was introduced by the Chairman of the Drafting Committee at the 2322nd meeting of the Commission. It contained the text of the articles adopted by the Committee on second reading namely articles 1 (scope of the present articles), 2 (use of terms), 3 (watercourse agreements), 4 (parties to watercourse agreements), 5 (equitable and reasonable utilization and participation), 6 (factors relevant to equitable and reasonable utilization), 8 (general obligation to cooperate), 9 (regular exchange of data and information) and 10 (relationship between different kinds of uses). It was also noted that the study the Special Rapporteur has been requested to undertake concerning

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[269] See the Report of the International Law Commission on the work of its forty-fourth session, (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10) (A/47/10), p. 130, para. 350.

[270] In his report, the Special Rapporteur also referred to the most recent developments relevant to the environment and to watercourses but expressed the view that nothing in them required fundamental change in the text of the draft articles. He referred in particular to the work product of the United Nations Conference on Environment and Development (A/CONF.151/26/Rev.1 (vol. 1)); Convention on Environmental Impact Assessment in a Transboundary Context of 1991 (E/ECE/1250); and Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992 (International Legal Materials, vol. XXXI, p. 1312).

unrelated groundwaters may require reconsideration of some aspects of the articles. In line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time, it will have before it the material required to enable it to take a decision on the proposed draft articles. At the present stage, the Commission merely took note of the report of the Drafting Committee.

1. Issues of a general character

(a) Framework convention or model rules

344. In the report, the Special Rapporteur expressed the view that it could be more productive in certain types of work, such the as topic of watercourses, if the Commission were to decide at an early stage on the form of the final product. He noted that this issue had also been mentioned by some Governments in their comments. At a minimum, he felt that the Commission should have a preliminary exchange on this point before any further drafting was undertaken. The Special Rapporteur noted the differences between a framework convention and model rules but did not express any particular preference for either. The utility of a framework convention, he suggested was to be measured by the extent of its ratification; that of model rules, in the strength and depth of the endorsement of the rules by the General Assembly. He saw no point in advocating a framework convention absent some expectation of widespread acceptance and, even more so, no defensible point in advocating any other approach at this stage unless such advocacy was combined with a willingness to support a recommendation for very strong endorsement of the work product by the General Assembly.

345. As regards the form of the future instrument, some members commented on the arguments presented by the Special Rapporteur as supportive in favour of model rules. The first of those arguments was that there would be little point in advocating the framework convention approach, absent some expectation of widespread acceptance. That argument was described as somewhat unconvincing, for States had indeed demonstrated a widespread acceptance of the articles as the basis of a framework agreement. The Special Rapporteur's second observation was that the model rules would require very strong endorsement by the General Assembly. Such endorsement would however, it was noted, be no stronger than the support given to the framework convention. The

Special Rapporteur also stated that model rules would facilitate including more specific guidance, an assertion which was considered as questionable, given the wide variety of rivers and situations involved.

346. While the idea of formulating model rules met with reservations on the part of several members, one member saw some merit in it inasmuch as the more flexible the final document was the more possibilities there would be for States to adapt the general rules to the regime applicable to specific watercourses and, hence, the wider the recognition such general rules would receive.

347. Most of the members who commented on the issue expressed preference for a framework convention, pointing out that this approach underlay all the work carried out so far, had been broadly endorsed in the Sixth Committee, and was generally given preference in the written comments of Governments. The Commission was a codification body and not a "think tank" called upon to produce studies. The Commission, it was noted also, had in its commentary to article 3, already expressed preference for a framework convention "which will provide for the States parties the general principles and rules governing the non-navigational uses of international watercourses, in the absence of a specific agreement among the States concerned and provide guidelines for the negotiation of future agreements". Though model rules would make it possible to circumvent the problem of ratification, this should not overshadow the legal advantages of a binding instrument, particularly since the present draft articles had all the qualities and elements of a framework convention. The points were also made that many of the draft articles dealt with procedural mechanisms which could become fully effective only within the framework of a treaty and that the draft articles could realize their full potential only if they were embodied in an instrument with binding force. It was also said that in an era of growing environmental awareness the importance of the matter warranted the conclusion of a multilateral treaty.

348. The point was made by one member, who was in favour of a framework agreement, that if the Commission chose to remain faithful to the framework approach, it would have to clarify the meaning of the term "adjust" in article 3.

349. While recognizing that there had been a broad though not unanimous understanding in the Commission that the draft articles would ultimately form the basis of a framework convention, i.e. a convention containing residual

rules that would apply in the absence of more specific agreements, one member felt that a framework convention fell short of the aims and purposes of codification and progressive development of the law and expressed preference for a general convention specifying in detail the rights and duties of watercourse States. He observed that the perceived differences in the characteristics of individual watercourses did not constitute an effective bar to the real application of the law on watercourses and that the elaboration of a general convention was politically feasible. In his view, the signing of the Helsinki Convention on the Protection and Use of Transboundary Watercourses and of International Lakes 271/ demonstrated that it was politically and legally possible to regulate State activities, relating to varied watercourses, through uniform, specific and directly applicable rules. A fortiori, he could not accept the suggestion that the present endeavour should culminate in a set of model rules.

350. Some members felt that it was too early to choose between model rules and a framework convention; and the Commission's final decision on the matter should be postponed to a later stage. The point was made that the ultimate decision would depend on the quality of the Commission's work and that, if the draft articles were balanced and authoritative, they would inevitably commend themselves to the international community. Governments that had commented on the issue were divided, it was said, and many States which had transboundary waters on their territories had not as yet sent in their observations and may not be able to do so in the immediate future. The Special Rapporteur noted that a generally favourable comment on the draft by a Government should not necessarily be taken as a harbinger of future ratification.

(b) Dispute settlement

351. The Special Rapporteur noted that a number of Governments had urged the Commission to review the question of including dispute settlement provisions in its draft articles. He shared that view, as had the former Special Rapporteur, and believed that in the light of the nature of the issues involved, it would be an important contribution for the Commission to recommend a tailored set of provisions on fact-finding and dispute settlement should it decide to recommend a draft treaty and, arguably, even if it opted, instead, for model rules.

271/ For reference see supra note 270.

352. The question whether the draft articles should include dispute settlement clauses was answered positively by the majority of members. It was recalled that dispute settlement clauses providing for mandatory conciliation had been included by the previous Special Rapporteur in his sixth report (1991) and had not been pursued further only because of want of time for their consideration. The point was made that, as the needs of populations increased and water resources became even scarcer, disputes on the use of international watercourses were likely to proliferate and might assume serious proportions if were not resolved at the technical level. Attempts to politicize disputes were bound to be counterproductive.

353. Other members doubted the value of including dispute settlement clauses in the draft articles. The observations were made that watercourses were diverse and a specific dispute settlement machinery might be required in each case. The comment was made that, in view of the flexibility of the legal instrument being prepared, the means of dispute settlement noted in Article 33 of the Charter would always be available to the parties concerned and disputes relating to the uses of watercourses under consideration could more effectively be resolved by political means, rather than by adjudication; as evidenced by the experience of the organization for the development of the Senegal River. Furthermore, it was pointed out that Part III of the draft articles contained a set of procedures for consultations which aimed precisely at preventing disputes between States.

354. Some of the members who were of the view that dispute settlement clauses should be included in the draft articles considered that the Commission should first complete its work on the draft articles before turning to the question of dispute settlement.

355. As to the particular dispute settlement procedures to be considered, the observation was made that disputes with reference to uses of international watercourses were of a special nature and called for special settlement procedures. Attention was drawn in particular to disputes relating to: equitable and reasonable utilization of a particular watercourse, procedures for fact-finding, assessment and evaluation.

356. The view was expressed that the establishment of river-basin committees or other similar bodies was a general possibility and would be in accordance with a fairly widespread practice. Reference was made in this connection to the recommendations formulated on the subject in 1972 by the United Nations

Conference on the Human Environment and to the encouraging experience of the Niger Basin Authority, the Gambia River Basin Development Organization, and the International Commission for the Protection of the Rhine against Pollution; and as well, to the machinery envisaged for the protection of the environment in the Danube basin. Thus, the draft articles could usefully provide certain general rules on regional cooperation.

357. According to another view, the elasticity of the substantive rules made it indispensable to provide for compulsory fact finding and conciliation and for compulsory and binding arbitration and judicial settlement.

(c) Other general comments

358. Many members agreed with the Special Rapporteur that the Commission owed a great deal to his predecessors, and in particular to Mr. McCaffrey, under whose guidance the first reading of the draft articles had been conducted within a relatively short time. While the draft articles were considered by a number of members as a remarkable achievement, resulting in a generally favourable response from Governments, and requiring only as the Special Rapporteur had put it, "fine-tuning", the remark was made that the task at hand was, in their view, a complex one. There were many international agreements relating to international water courses dealing with different situations, and each State would approach the draft articles from its own national perspective. There were accordingly various preferences that had been expressed about the way in which the draft articles should be finalized. There was also a view that the reaction to the draft articles from both Governments and the academic community seemed to advise a deep overhaul of the articles rather than "fine-tuning".

359. The preliminary report of the Special Rapporteur was generally praised as succinct, yet reflecting a full understanding of the topic. For some members, the Special Rapporteur had rightly resisted the temptation to "tinker" except when absolutely necessary. For others, however, he had made proposals which went beyond fine-tuning and might ultimately upset the balance of the text adopted on first reading. According to yet another view, the draft should be reconsidered and brought up to date to reflect the most recent relevant developments. Attention was drawn in this context to the concept of sustainable development and the so-called holistic approach to protection of the environment integrating economic and social considerations with environmental issues, as reflected in principle 4 of the Rio Declaration and

in chapter 18 of its Agenda 21 relating to the protection of the quality and supply of freshwater resources, and the application of integrated approaches to the development, management and use of water resources. Mention was made in particular of: paragraph 18.8 of Agenda 21 (whereby "integrated water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization"); of paragraph 18.9 (which stressed that "Integrated water resources management, including the integration of land- and water-related aspects, should be carried out at the level of the catchment basin or sub-basin"); and the requirement of an environmental impact assessment in principle 17 of the declaration, (which read: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority"). Reference was also made to the progress achieved in the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and of International Lakes, 272/ and the 1991 Convention on Environmental Impact Assessment in a Transboundary Context. 273/

2. Issues relevant to specific articles 274/

(a) Issues relevant to Part I (Introduction) of the articles

Article 1

Scope of the present articles

> 1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourses and their waters.
>
> 2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

272/ For reference see *supra* note 270.

273/ Ibid.

274/ The views of the Special Rapporteur on specific articles are to be understood as being without prejudice to the question of form.

360. On the basis of comments by Governments, the Special Rapporteur saw no reason for any changes in article 1. He noted that some Governments, in their comments, had reopened the question of the appropriateness of the term "watercourses". In the light of the fact that the term was the result of a compromise, he felt that it would not be prudent to change it. As regards the suggestion that the term "transboundary waters" be used because of its use in a recent convention, 275/ he found it a matter of drafting and found no substantive difference between that term and the one used in article 1.

361. A few members commented on article 1 with most supporting the existing text. The view was expressed by one member that article 1 did not reflect a proper balance in the relationship between navigation and other uses of international watercourses. As article 1 was drafted, and as the matter was explained in the commentary, the articles could, in his view, be also understood as covering navigational uses, which fell outside the scope of the draft articles. An attempt should be made to correct that imbalance in the course of the second reading of the draft articles.

362. The point was made that the concept of integrated water resources management, as recognized in paragraphs 18.8 and 18.9 of Agenda 21, should be incorporated in article 1, paragraph 1. To do so, the word "management" should be included before the word "conservation". A preference was also expressed by one member for "transboundary waters" instead of "international watercourses".

Article 2

Use of terms

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

275/ See Convention on the Protection and Use of Transboundary Watercourses and International Lakes, supra note 270.

363. The Special Rapporteur raised two issues in relation to article 2. First, he recommended that the phrase "flowing into a common terminus" in subparagraph (b) be deleted. In his view the notion of "common terminus" did not seem to add anything to what was already covered by the rest of the subparagraph and could be confusing. If retained, the phrase risked the creation of artificial barriers to the scope of the draft articles. Second, he was inclined to include "unrelated confined groundwaters" in the topic. If the Commission was receptive to that idea (see para. 441 below), he would then propose relevant changes in article 2. He did not think that such change would require major changes in any other articles. He recommended that, subject to the two issues he raised, the Commission should treat article 2 as a valid working hypothesis for the second reading and revert to it only to the extent that work on subsequent articles revealed an unexpected need to re-examine article 2. He further recommended that the definition of the term "pollution" currently contained in article 21 be transferred to article 2. Such a shift, he found helpful to what he was proposing for article 7 (see para. 410 below) but it was not essential, and acceptance of such a shift in no way implied agreement to or enhanced the utility of any change in Part I or Part II of the draft.

364. Several members commented on article 2 and their comments concerned two issues: the reference to "flowing into a common terminus" in subparagraph (b) and the possible inclusion of "confined groundwaters" in the scope of the articles.

365. As to the reference to "flowing into a common terminus" in subparagraph (b) of article 2, several members disagreed with the Special Rapporteur's proposal for its deletion. In their view, this requirement had been included to introduce a certain limitation upon the geographic scope of the articles: the fact that two different drainage basins were connected by a canal would not make them part of a single "watercourse" for the purposes of the articles. In a State where most of its rivers were connected by canals, the absence of the requirement of common terminus would turn all those rivers into a single system and would create an artificial unity between watercourses. A common terminus criterion would, moreover, help to distinguish between two watercourses flowing alongside each other. Deleting the words "flowing into a common terminus" would expand the scope of the articles and make it more difficult to implement them in practice.

366. A few members reserved their positions pending further careful examination of the issue by the Special Rapporteur.

367. A comment was also made that the term "watercourse" should be more precisely defined to indicate whether it includes only surface water or more. It was noted that the draft did not properly deal with the diversion of waters, for example, by canals. Further examination of the issue was necessary.

368. As regards the issue of confined groundwaters, many members expressed the view that it would be illogical to include in the concept of "watercourse" unrelated confined groundwaters. They did not see how "unrelated" groundwaters could be envisaged as part of a system of waters which constituted "by virtue of their physical relationship a unitary whole". And if there was no physical relationship, how could such waters be part of a unitary whole? They agreed that the question of confined waters deserved regulation, but it called for a different set of rules. In their view, few if any of the articles, other than those embodying general principles, could be applied to confined groundwaters.

369. According to the same view, international watercourses had been regulated for thousands of years, but the use of confined groundwaters was a relatively new phenomenon. The argument of diversity, which had led to the adoption of the framework agreement approach for watercourses, was less compelling in the case of confined groundwaters. Moreover, the law relating to groundwaters was more akin to that governing the exploitation of natural resources, especially oil and natural gas. The best course was to treat the topics of international watercourses and the law of confined groundwaters separately, in the way in which the Commission had dealt with the law of treaties in regard to State succession. Separate treatment was warranted particularly in view of the fact that groundwaters in some parts of the world, such as Africa, a continent with vast desert areas, were very important.

370. Another reason mentioned by those members who did not agree with the proposal to include confined groundwaters in the draft was that such an inclusion would require considerable redrafting of the articles; that would delay the Commission's goal of completing the second reading of the articles by next year.

371. Several members of the Commission reserved their position until such time as they had been able to consider, next year, the further study to be

undertaken by the Special Rapporteur. They felt that such a study should include, for example, the physical conditions governing confined groundwaters, the relationships between the different parts of what might be a system of transboundary groundwaters, and the role played by groundwaters in the general water cycle.

372. Many members supported the Special Rapporteur's proposal to move the definition of "pollution", now contained in article 21, paragraph 1, to article 2 and agreed with the Special Rapporteur that the change in no way implied agreement to any change in Parts II or III of the current draft.

373. The point was made that, however, in principle, when a term occurred only once in the articles, it should be defined in that particular place. Accordingly there was no need for the move.

Article 3

Watercourse agreements

> 1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.
>
> 2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the watercourse.
>
> 3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

374. The Special Rapporteur referred to the comments made and reasons given by some Governments, for replacing the word "appreciable" by the word "significant". The Special Rapporteur stated that he was persuaded by those reasons. They included, among others, the practice to date in roughly comparable instruments. The Special Rapporteur advanced two arguments in support of such a change. First, in his view, the word "appreciable" had two quite different meanings: (a) capable of being measured; and (b) significant. Second, since the commentary made it clear that "appreciable" was to be

understood as "significant", he found it preferable for the article, itself, to so state; rather than for it to be necessary to read the commentary in order to understand the meaning of the term. Such a change to article 3, he suggested should be understood as implying such a change throughout the draft articles. In his view, the complexity and risk of confusion of using one term in, for example, articles 3 and 4 and another term in article 7 far outweighs any benefit that might be derived from an attempt at hyper-refined tuning. He noted that the change in article 3 would require changes in articles 7, 12, 18 (1), 21 (2), and 28 (2).

375. The Special Rapporteur found the suggestion by some Governments to the effect that article 3 should include the notion that it did not affect existing watercourses agreements problematic and unnecessary. In his view, the Commission was not in a position to know with any certainty whether all the bilateral or multilateral agreements, or whether even some of those agreements, were inconsistent with the fundamental premises of the draft articles. He found nothing in the present articles which would rule out any subsequent agreement, whether or not consistent with the current text. It seemed to him excessive, however, to presume the continued validity of some lex posterior inconsistent with the current draft, absent some indication of intent by the State or the States concerned. He thought that a better solution for avoiding uncertainty would be for States, upon deciding to become party to these articles, to state their intention with regard to the application of the articles to all, or some of the existing agreements to which they are party. In that regard he also drew attention to paragraph 3, and suggested the possibility of adding to "characteristics and uses" the notion of agreements, thus making the paragraph read:

> "3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics, uses of, or existing agreements concerning a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements or reaching an understanding."

376. The Special Rapporteur also referred to the comments made by some Governments expressing preference for moving articles 8 and 26 ahead of article 3 on the ground that the draft articles were, first and foremost, a framework for cooperation; and agreements entered into between watercourse States to that end. He did not believe movement of articles would change the

substance of the draft, but it would make the flow of the articles more logical. He, therefore, recommended that articles 8 and 26 be placed before article 3.

377. The comments on article 3 concerned two issues: replacement of the adjective "appreciable" with "significant" and the question of how to deal with existing watercourse agreements.

378. As to the replacement of the adjective "appreciable" with "significant", two different views were expressed.

379. One view, expressed by many members, was that it would be preferable to replace "appreciable" with "significant", since it was apparent that, in all cases, adverse effects or harm went beyond the mere possibility of "appreciation" or "measurement"; and it was clear that what was really meant was "significant" in the sense of something that was not negligible but which yet did not necessarily rise to the level of "substantial" or "important". In paragraphs (13) to (15) of its commentary to article 3, the Commission had not been entirely successful in its attempt to clarify the matter. "Appreciable", according to the commentary, contained two elements: the possibility of objective appreciation, detection or measurement, and a certain degree of importance, ranging somewhere between the negligible and the substantial. The problem was that "appreciable" could be understood as containing only the first of those elements. Anything that could be measured would be deemed to be "appreciable". According to this view, both elements had to be present in any qualifications of harm.

380. In addition, according to this view, the word "appreciable" did not indicate the intended threshold. In most cases, "appreciable" could be taken to mean "not negligible" and did not designate the point at which the line should be drawn. That line was crossed when "significant" harm was caused - harm exceeding the parameters of what was usual in the relationship between the States that relied on the use of the waters for their benefit. For that reason they agreed with the Special Rapporteur's proposal to replace "appreciable" with "significant".

381. It was also noted that the threshold set by the word "significant" was a standard that had been approved by States in their endeavours to set an agenda for the protection and preservation of the environment at the Rio Conference. Also, the establishment of an adequate threshold was crucial, if worldwide acceptance of the draft articles was to be secured.

382. Those members who did not agree with changing "appreciable" to "significant" felt that such a change went further than the necessary distinction between inconsequential harm that could not be even measured, on the one hand, and consequential harm, on the other. The change, in their view, would raise the threshold. The subjectivity inherent in the term "significant", they felt, would leave the potential victim State defenceless, contrary not only to its interests but to protection of the watercourse itself. The result would be to ignore the cumulative effects of lesser harm, which could be substantial, especially in combination with other elements. The change took no account of the particular conditions of each watercourse, and the history of its use, which could mean different degrees of tolerance and vulnerability to harm.

383. The observation was also made that in the law relating to watercourses, the applicable threshold seemed, in general, to have been established at a level lower than that implied by the term "significant". In a number of early and contemporary treaties, 276/ the terms used were closer to the English "appreciable" ("ouvrage qui pourrait sensiblement modifier"; "entraves sensibles"; "changement sensible du régime des eaux"; "perjuicio sensible"; and "projet susceptible de modifier d'une manière sensible").

384. The view was also expressed that the word "appreciable", denoted something that could be established by objective evidence and also conveyed the notion of "significant" and "substantial". There were instances in the articles, however, where it was not the extent of the harm that was decisive for the interests of the watercourse States. That was why the word "appreciable" was often used in treaties, though the word "significant" occurred twice in the Rio Declaration, in principles 17 and 19, respectively. Consequently the matter was not as clear-cut as it might appear. The Commission should consider, once again, the relative merits of the two words before taking a final decision.

276/ Such as the 1891 Treaty between the United Kingdom and Italy, the 1905 Treaty between Norway and Sweden, the 1931 agreement between Romania and Yugoslavia, the Act of Santiago of 26 June 1971 between Chile and Argentina, the 1972 Convention on the Status of the Senegal River, and the Agreement of 26 February 1975 between Argentina and Uruguay.

385. It was also noted that the translation issues involved compounded the problem of the meaning of the two terms. While many agreements 277/ used the Spanish word "sensible" to refer to the threshold of harm, the English word "significant" was currently being translated as "importante" in Spanish and as "sensible" in French. Whatever the Commission's final decision about replacing the word "appreciable" by "significant" in the English text of article 3, the word used in the Spanish text could not be "importante". Another word, indicating a lower threshold needed to be used. Perhaps the Spanish word "sensible" could be used in Spanish.

386. The comment was also made that whatever the term used in the articles, the same term should also be used in the draft articles on International liability for injurious consequences arising out of acts not prohibited by international law, since the two topics dealt with similar problems. Some members, however, did not agree with this view and felt that the choice of wording should be determined by the Commission's approach to a particular topic.

387. Most members who addressed the question of existing agreements did not favour the Special Rapporteur's suggestion. (See para. 375 above). They expressed the view that the matter should be left to be governed by the law of treaties. In their view, there was no doubt that watercourse agreements which would be concluded in the future and which were expressly contemplated in the articles would take precedence over the articles. Given the residual character of the articles, States were free to include in watercourse agreements to be concluded any provision they regarded as an adjustment to the provisions of these articles, provided that third States were not affected. The question was, perhaps more problematic when it came to watercourse agreements already in force. Would those agreements supersede the articles? As a solution to the problem, the Special Rapporteur had suggested that, when States became parties to the articles, they should indicate their intent or understanding with regard to some or all of their existing agreements. While that seemed to be a logical solution, a problem would remain if the parties to an existing agreement did not all take the same position. The Special Rapporteur might wish to consider the problem further and propose a provision with a view to avoiding future difficulties.

277/ Ibid.

388. As regards the proposal to place articles 8 and 26 ahead of article 3, some members found it reasonable and felt that it would improve the structure of the text. Some other members wondered whether that move would not affect the logic of the order of the articles. Those two articles dealt with cooperation and management and did not fit into the "Introduction", which dealt essentially with the scope of the draft. According to one view, article 26 in part II ("General principles") should not be moved, but the Drafting Committee might wish to consider the possibility of elaborating a general principle on the integrated approach, on the basis of Principle 4 of the Rio Declaration, leaving the part on management in article 26 as drafted.

389. Other suggestions were made regarding the movement of articles: it was suggested that the articles of Part VI, ("Miscellaneous provisions") might be moved to other parts of the draft; article 31 ("Data and information vital to national defence or security") could be attached to article 9 ("Regular exchange of data and information"); and article 32 ("Non-discrimination") could be transferred to Part II ("General principles").

Article 4

Parties to watercourse agreements

> 1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.
>
> 2. A watercourse State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

390. The Special Rapporteur found article 4, as drafted, appropriate. He felt that the term "applies to" in paragraph 1 related to the scope of the agreement and was not synonymous with and did not serve the same function as "affects appreciably". He felt that the deletion of paragraph 2, as suggested in the comments of some Governments, would result in putting additional undue burdens on lower riparian States. Merging the two articles would not be impossible, but he did not recommend it, because it would make the text heavier and more difficult to comprehend.

391. A few members commented on article 4.

392. Some of those commenting agreed with the Special Rapporteur's view that no change was necessary in article 4 and that any ambiguity was dispelled by the Commission's commentary to the article.

393. A different view was also expressed, to the effect that article 4 should be re-examined. It was stated by one member that, under the article, the entitlement of a watercourse State to become a party to agreements, whether those agreements applied to the whole or only part of the watercourse, was an exception to the fundamental principle whereby States enjoyed freedom to choose their treaty partners. That exception had to be narrowly construed. A watercourse agreement, even one which applied to the entire watercourse, might conceivably cause no harm, or virtually no harm, to the interests of another watercourse State. Uses by third States could and should be protected against adverse effects arising out of the conclusion by other watercourse States of watercourse agreements, but by some means less restrictive than that envisaged in the article. For instance, States contemplating the conclusion of an agreement could be required to enter into consultations with third watercourse States to ensure that their uses would not be affected by the conclusion of the agreement in question.

394. Yet a further reason advanced for reviewing article 4 was that article 30, which had been adopted after article 4, contemplated a situation in which the obligations of cooperation provided for in the draft articles could be fulfilled only through indirect channels. Such a latitude, which reflected an approach similar to the one adopted in Part XII of the Convention on the Law of the Sea, was a realistic acknowledgement that the mere fact that a watercourse passed through the territories of two or more States, while arguably creating a community of interests of some sort, was not the sole factor of which the law should take cognizance.

395. It was also stated that, article 4, would not presumably, apply to cases in which a watercourse State entered into an agreement with a non-watercourse State, or with an international financial institution, with a view to initiating new works on the watercourse. In such cases, the relationship would be governed by general rules of the law of treaties relevant to the interests of third States. There was no reason why the rules governing agreements between watercourse States should differ from general rules of the law of treaties, including the fundamental rule of pacta sunt servanda.

(b) Issues relevant to Part II (General Principles) of the articles

(i) Comments on Part II as a whole

396. In the view of the Special Rapporteur, the relationships between articles 5 and 7 were, as indicated in comments by some Governments, unclear. Some comments had expressed a preference for eliminating article 7 or subordinating that article to article 5 and making "equitable and reasonable" virtually the sole criteria for use. Other comments indicated that "appreciable" or "significant" harm in all cases was evidence of inherently inequitable or unreasonable use and implicitly or explicitly subordinated article 5 to article 7. While these issues, in particular the nature of the responsibility of the affecting State, were, in the view of the Special Rapporteur, clarified to some extent by the commentary, he recommended that necessary changes be made in the text of article 7 for which he proposed a text (see para. 410 below). That revision would make "equitable and reasonable use" the determining criterion, except in cases of pollution, as defined in the draft articles. In the case of pollution, article 5 would be subordinated to article 7, the subordination being defeasible by a clear showing of extraordinary circumstances; in effect, a rebuttable presumption.

397. Regarding the proposal to make the concept of equitable and reasonable utilization and participation clearer, the Special Rapporteur explained that he could see no way of adding detailed guidance to article 5 that would make sense in a framework agreement. He noted, for example, that, in some cases, territorial apportionment was agreeable to the watercourse States, in some others periodic rotation, or sharing the benefits of a hydroelectric facility, apportionment or allotment of uses, compensation arrangements, etc., were agreeable. Each of these applications of reason and equity were specific to the facts of the particular situation and thus did not seem susceptible to generalization and recommendation as being of general utility in a framework treaty. He felt that, perhaps, the commentary to article 5 could be expanded to provide a somewhat lengthier description of the possibilities States could consider in reaching equitable and reasonable results. He further noted that this was clearly a major area in which problems could be alleviated by providing for third-party involvement, should the States concerned be unable to reach a mutually acceptable solution.

398. Several members commented on the relationships between articles 5 and 7 and the concepts of "equitable and reasonable utilization", on the one hand,

and appreciable or significant harm, on the other. They noted that the Special Rapporteur had rightly stated that articles 5 and 7 constituted an essential component key element in the entire set of draft articles yet the two were not without ambiguity. The ambiguity, however, in their view, arose out of the compromise between: on the one hand, those who believed that "equitable and reasonable" use, as provided for in article 5, should be the main consideration, implicit in which might be the right to cause some harm; and, on the other, those who gave predominance to harm on the ground that no use could be regarded as "equitable and reasonable" if it resulted in harm to another State. The Special Rapporteur's proposed redrafting of article 7 would impose on States only an obligation to "exercise due diligence", not an obligation not to cause appreciable or significant harm. Thus, where the use was equitable and reasonable, some harm would be allowable, with the result that equitable and reasonable would become the overriding consideration. By way of an exception to the general principle, only harm resulting from pollution would render a use inequitable and unreasonable, although, even then, the harm might be permitted if there was no imminent threat to human health and safety. The Special Rapporteur's proposed redrafting would, in their view, completely upset the delicate balance achieved on first reading. The concept of sic utere tuo ut alienum non laedas would become subordinated to the imprecise notion of "equitable and reasonable" use, which did not offer an objective standard; and thus could not be accepted, by itself, as the basic principle for regulating problems arising out of the uses of watercourses that might cause transboundary harm. The fact that the concept of equitable and reasonable utilization was supported by many authorities and appeared in many international instruments did not make it a good substitute for the basic principle that the overriding consideration was the duty not to cause significant harm to other States. It was noted that many members had agreed to article 5, as adopted on first reading, on the understanding that article 7, as now formulated, would be included in the draft articles.

399. There were further reasons advanced by those members who did not agree with the proposed redrafting of article 7.

400. First, it was said, the rule of equitable utilization was highly subjective. Presumably, the Special Rapporteur hoped to mitigate the adverse effects of that rule by means of dispute settlement procedures. While it was not known whether such procedures would include binding judicial settlement,

it was very important to ensure certainty in the substantive rules. The task of those called upon to decide what constituted appreciable or significant harm would be complicated still further if the rule of no appreciable or significant harm was subordinated to the rule of equitable utilization.

401. Second, the Special Rapporteur proposed an exception to that exception in cases where there was a clear showing of special circumstances indicating a compelling need for an ad hoc adjustment and the absence of any imminent threat to human health and safety. Apart from the uncertainty likely to arise in the interpretation of that rule, pollution was so widely defined under article 21 as to render virtually academic any distinction between activities that caused appreciable or significant harm and activities that caused pollution.

402. The comment was also made that the proposed redrafting by the Special Rapporteur was not without difficulties. When he stated that "a use which causes significant harm in the form of pollution shall be presumed to be an inequitable and unreasonable use unless there is ... (b) the absence of any imminent threat to human health and safety", the merits of such a limitation could be questioned. One had only to imagine, for example, the significance for certain riparian States of pollution which resulted in the death of all the fish in the watercourse system.

403. Some members expressed the view that article 7 could be deleted. In their view the content of the principle of equitable and reasonable utilization set out in articles 5 and 6, would be determined by States. It would be helpful, therefore, if article 5 were to propose model forms of utilization; e.g., concerning, for example, the division of a watercourse among States, for that would facilitate the settlement of disputes. Article 7 would then become redundant because it would constitute an exception to the principle of utilization of private property without harming others. In addition, article 7 laid down a standard, already reflected in a number of articles and designed to trigger various procedures, such as those relating to notifications, consultations and negotiations. It was also stated that the requirements contained in article 7 could be placed in article 5 and article 7 could be deleted.

404. Some other members indicated a readiness to accept the explicit reference to due diligence in the Special Rapporteur's proposal while not supporting the rest of his suggestions on article 7.

(ii) Comments on specific articles of Part II

Article 5

Equitable and reasonable utilization and participation

> 1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.
>
> 2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

405. The Special Rapporteur recommended no changes in article 5.

406. In addition to the comments made in paragraphs 398 to 404 above, some members made additional comments addressed specifically to article 5. The comment was made that the entitlement of a State to equitable and reasonable utilization of international watercourses was subject to the State's obligations to promote the optimal utilization and consequent benefits consistent with adequate protection for the watercourse. In that sense, the concept of optimal utilization embraced that of sustainable development. The commentary to the article was generally acceptable, though it was questionable to suggest in paragraph (3) that optimal utilization did not imply "maximum" use by any one watercourse State consistent with efficient or economical use, but rather the attainment of maximum possible benefits for all watercourse States. Such an interpretation was not a proper reflection of the practice of most States which, in the absence of express agreement to the contrary, relied on their own capabilities and resources to maximize benefits, subject always to the requirements of economy as well as to the need to protect the watercourse and to avoid causing significant harm to other co-riparian States. All of this was neatly encapsulated in the criterion of equitable and reasonable utilization of a watercourse. In addition, article 5 should concentrate on the basic principle of equitable and reasonable use as more clearly reflected in article IV of the International Law Association's

Helsinki draft on uses of waters of international rivers of 1966, which set forth the concept of entitlement of watercourse States in more positive terms than did paragraph 1 of article 5.

407. Some members also suggested the deletion of paragraph 2 of article 5, since the right to equitable participation was no more than a right of cooperation, which was elaborated in great detail in article 8, on cooperation.

Article 6

Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(d) existing and potential uses of the watercourse;

(e) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

408. As regards article 6, the Special Rapporteur referred to the changes suggested by some Governments but found them unnecessary in the light of: the contents, inter alia, of the existing articles, including in particular the logic of the entire draft and article 6 (d) concerning existing uses; article 21 (1) concerning the quality of the water; and article 6 (c), 6 (f) and article 10 (2) and the suggested revised article 7 so far as situations of particular dependence are concerned. He noted that, of course, those comments were without prejudice to the consideration of article 6, in connection with

the substance of article 26, upon which he was not ready to comment upon at this time. He also opted for the retention of paragraph 2 of article 6, even though articles 8 and 10 (2) arguably imposed a similar obligation. Moreover, if the Commission decided to include third-party dispute settlement in this part of the draft, in his view paragraph 2 should be retained.

409. With regard to article 6, it was pointed out that the list of factors in paragraph 1 was not exhaustive, but all six categories were very pertinent. The article should, therefore, be maintained in the proposed form. The comment was also made that the concept of "existing uses" had gained some currency in State practice as an important factor in measuring significant or substantial harm. However, the need to reconcile that factor with the equally important consideration of the development needs of States should be given the same priority.

Article 7

Obligation not to cause appreciable harm

> Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

410. Pursuant to the comments made above (see paras. 396 and 397) the Special Rapporteur proposed the following redraft for article 7:

> "Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States, absent their agreement, except as may be allowable under an equitable and reasonable use of the watercourse. A use which causes significant harm in the form of pollution shall be presumed to be an inequitable and unreasonable use unless there is: (a) a clear showing of special circumstances indicating a compelling need for ad hoc adjustment; and (b) the absence of any imminent threat to human health and safety."

411. In addition to the comments made by members which appear in paragraphs 398-404 above, it was noted that it would be useful to incorporate the concept of "due diligence" and the principle of precaution in article 7.

Article 8

General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9

Regular exchange of data and information

1. Pursuant to article 8, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10

Relationship between uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

412. The Special Rapporteur noted that, at the present time, he was not inclined to recommend changes in these articles. He was sympathetic to the concern expressed by some Governments about the generality of article 8. He stated that he would continue to reflect on ways to make the article more precise without detracting from the ability of the draft articles as a whole to serve as a framework relating to many varied situations. He noted further that in his view it would not be prudent to attempt to apply the principle of

good faith expressly to part of an agreement or to one particular provision of an instrument such as this draft. In any event, he did not believe that such additions would appreciably decrease the generality of the article.

413. Some members who addressed article 8 agreed with the Special Rapporteur that no change was required in the article. Regarding the possibility of making the text more precise, a view was expressed to the effect that any more precision of the article might be at the cost of sacrificing its general nature.

414. Some members agreed with the Special Rapporteur that the concepts of "good faith" and "good neighbourliness", though salutary in themselves, had no place in the articles. Moreover, it was said, a duty to cooperate might not always be realistic for watercourse States, many of which were bedevilled by disputes. For that reason, the words "endeavour to" should be added before the word "cooperate" in article 8 to underline the importance of cooperation; without making it obligatory for States to cooperate.

415. Another view was also expressed to the effect that achievement of the goals of watercourse utilization and management depended on the obligation to cooperate, set forth in article 8. Those goals had to be sought not only on the basis of sovereign equality, territorial integrity and mutual benefit, as provided for in the article, but also, as noted in the commentary, with due regard for good faith and good neighbourliness. Cooperation could not be imposed: it could only be cultivated on a reciprocal basis. The common interest inherent in the process of the utilization of water resources would promote this cooperation; the multiple and often conflicting uses perforce called for an integrated approach.

416. A few comments were made on articles 9 and 10 stressing their importance. As regards article 10, paragraph 2, which dealt with the question of a conflict between uses of an international watercourse, it was suggested that it would perhaps be advisable, with a view to the implementation of that provision, for the Commission to prepare some flexible system of consultation.

CHAPTER VI

OTHER DECISIONS AND RECOMMENDATIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission, and its documentation

417. At its 2295th meeting, the Commission noted that in paragraph 9 of resolution 47/33, the General Assembly had requested it

> "(a) To consider thoroughly:
>
> (i) The planning of its activities and programme for the term of office of its members bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics;
>
> (ii) Its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute, inter alia, to a more effective consideration of its report in the Sixth Committee;
>
> (b) To continue to pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work."

418. The Commission agreed that this request should be taken up under item 6 of its agenda entitled "Programme, procedures and working methods of the Commission, and its documentation", and that this agenda item should be considered in the Planning Group of the Enlarged Bureau.

419. The Planning Group held two meetings. It had before it the section of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-sixth session entitled "Programme and methods of work of the Commission" (A/CN.4/446, paras. 294 to 312).

420. The Enlarged Bureau considered the report of the Planning Group at its 3rd meeting on 7 July 1993. At its meeting, held on the same day, the Commission adopted, on the recommendation of the Enlarged Bureau, a series of recommendations from the Planning Group which are reflected below.

1. Planning of the activities for the remainder of the current quinquennium

421. The current programme of work consists of the following topics: State responsibility; Draft Code of Crimes against the Peace and Security of

Mankind; the law of the non-navigational uses of international watercourses; and international liability for injurious consequences arising out of acts not prohibited by international law.

422. In accordance with paragraph 9 (a) (i) of General Assembly resolution 47/33, the Commission considered the planning of its activities for the remainder of the term of office of its members. In doing so, it bore in mind, as requested by this resolution, the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics.

423. The Commission agreed that, while the adoption of any rigid schedule would be impracticable, the setting up of goals in planning its activities would be useful.

424. Taking into account the progress of work achieved on the topics in the current programme as well as the state of readiness for making further progress, and bearing in mind the different degrees of complexity of the various topics, the Commission decided that it would endeavour to complete by 1994 the draft of a statute of an international criminal court and the second reading of the draft articles on the law of the non-navigational uses of international watercourses, and by 1996 the second reading of the draft articles on the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. It also decided that it would endeavour to make substantial progress on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" and, subject to the General Assembly's approval, undertake work on one or more new topics (see para. 440 below).

2. Long-Term programme of work

425. In accordance with the decision taken by the Commission at its forty-fourth session, [278] the Working Group on the long-term programme of work established at that session [279] pursued its efforts at the present session with a view to identifying topics which might be recommended to the General Assembly for inclusion in the Commission's programme of work. In accordance with the procedure proposed and endorsed by the Commission at the

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[278] Official Records of the General Assembly, Forty-seventh session, Supplement No. 10 (A/47/10), para. 370.

[279] Ibid., para. 369.

forty-fourth session, 280/ the Working Group was to discuss the outlines and explanatory summaries prepared by designated members on each of the topics which the Working Group had pre-selected at that same session for provisional analysis.

426. The composition of the Working Group was as follows: Mr. Derek Bowett (Chairman), Mr. Awn Al-Khasawneh, Mr. Mohamed Bennouna, Mr. Peter Kabatsi, Mr. Mochtar Kusuma-Atmadja, Mr. Guillaume Pambou-Tchivounda, Mr. Alain Pellet, Mr. Jiuyong Shi, Mr. Alberto Szekely, Mr. Vladlen Vereshchetin and Mr. Chusei Yamada.

427. The Commission noted that, after examining an informal compilation of the outlines and explanatory summaries prepared in accordance with the procedure referred to above, the Working Group had recommended the incorporation into the Commission's agenda, under conditions and at a time to be decided in further discussions of the Planning Group of the Enlarged Bureau and the Commission, of the topics "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", it being understood that the order in which the two topics are mentioned does not suggest any priority.

428. The Commission noted that various delegations at the forty-sixth session of the General Assembly 281/ had suggested "The law and practice relating to reservations to treaties" as a possible topic for study by the Commission and that it had also been of particular interest among some members of the Commission last year. 282/ Although the 1969 Vienna Convention on the Law of Treaties, the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations set out some principles concerning reservations to treaties, they do so in terms that are far too general to act as a guide for State practice and leave a number of important matters in the dark. The questions to which these instruments provide ambiguous answers include differentiating between reservations and declarations of interpretation, the scope of declarations of interpretation,

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280/ Ibid.

281/ See document A/CN.4/L.469, para. 422.

282/ See document A/CN.4/L.473/Rev.1, para. 23.

the validity of reservations (a question which encompasses that of the conditions for the lawfulness of reservations and that of their applicability to another State) and the regime of objections to reservations (in particular the question of the admissibility and scope of objections to a reservation which is neither prohibited by the treaty nor contrary to its object and purpose). These same instruments are entirely silent about the effect of reservations on the entry into force of treaties, problems pertaining to the particular object of some treaties (in particular the constituent instruments of international organizations and human rights treaties), reservations to codification treaties and problems resulting from particular treaty techniques (elaboration of additional protocols, bilateralization techniques).

429. The Commission takes the view that the topic meets the criteria for selection established by the Commission and generally endorsed in the Sixth Committee. First, it seems to respond to a need of the international community, since it has been suggested by State representatives in the Sixth Committee, doubtless because of the obscurities and lacunae mentioned above. Second, the international climate is propitious, since the ideological obstacles in 1969 are now less of a problem. In addition, it falls within the competence of the Commission, where the doctrinal aspects and practice can be properly discussed. Lastly, it stands a good chance of producing concrete results within a reasonable period, namely the adoption on first reading, by the end of the present quinquennium, of a draft intended for the General Assembly.

430. The Commission is aware of the need not to challenge the regime established in articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties. It none the less considers that these provisions could be clarified and developed either in the context of draft protocols to existing conventions or a guide on practice to which States, international organizations and legal writers could refer.

431. As for the topic "State succession and its impact on the nationality of natural and legal persons", it is part of one of the three subtopics identified by the Commission in 1963 under the topic "Succession of States",

namely the subtopic "Succession in respect of matters other than treaties". [283] It is not however among the issues which have so far been dealt with under that subtopic.

432. According to the prevailing opinion, State succession does not result in an automatic change of nationality. It is the prerogative of a successor State to determine on its own whom it claims as its nationals and to indicate the methods through which its nationality is acquired (see *inter alia* article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws). The legislative competence of the successor State must, nevertheless, be exercised within the limitations which are imposed by general international law, such as the principle of effective nationality, as well as international treaties.

433. The criteria and other conditions for the acquisition of the nationality of a successor State have, in some cases, been determined by an international treaty. The peace treaties following the First World War, provided at the same time for the recognition, by the vanquished State, of a new nationality acquired *ipso facto* by their former nationals under the laws of the successor State and for the consequent loss of the allegiance of these persons to their country of origin. According to other instruments, the transfer of territory did not necessarily entail the automatic acquisition of a new nationality and the loss of the original nationality.

434. A number of treaties provided for a right of option which, in certain cases, was granted for a considerable period of time during which the persons concerned enjoyed a kind of dual nationality.

435. A survey of recent State practice should cover *inter alia* the solutions adopted further to the decolonization process, the dismemberment of the Soviet Union and Yugoslavia, and the dissolution of Czechoslovakia.

436. The recent tendency to place emphasis on the ethnic origin, when determining the criterion for granting the new State's nationality and to ignore the importance of the domicile criterion, is an alarming one. It not only favours statelessness but is in many respects questionable on the basis of the fundamental human rights standards.

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[283] The two other subtopics are entitled "Succession in respect of treaties" and "Succession in respect of membership of international organizations".

437. It appears that the formulation, on the basis of a comprehensive examination of State practice, of minimum standard criteria for "ex lege" acquisition of nationality could provide useful guidelines to legislators of new States that are in the process of drafting laws in this area. It should furthermore be recalled that by virtue of customary rules of international law, a large number of treaty rights and obligations are automatically binding on the successor State and that the application of many such treaties directly concerns individuals, or more precisely nationals of the treaty parties. Sometimes there is a need for the application of these treaties even before the nationality law is adopted by the successor State. Thus a "preliminary" determination of the nationality of individuals or moral persons residing in the territory where the change of sovereignty occurred becomes a pre-condition for the continued application of the mentioned treaties.

438. The Commission is of the view that this topic also meets the criteria for selection established by the Commission.

439. The outcome of the work of the Commission on this topic could for instance be a study or a draft declaration to be adopted by the General Assembly. The final form of the work will be decided by the Commission at a later stage.

440. The Commission decided that, subject to the approval of the General Assembly, the two topics discussed above would be included in its agenda and that arrangements for their consideration would be made at the next session of the Commission.

441. The Commission further noted the Working Group's recommendation that it should consider whether to request the Special Rapporteur on the topic "Non-navigational uses of international watercourses" to undertake a study in order to determine the feasibility of incorporating into the topic the question of "confined underground waters", without prejudice to the completion of the topic as a whole in 1994 as envisaged by the Commission last year.

442. The Commission agreed to address such a request to the Special Rapporteur, on the understanding that the feasibility study would be before the Commission at its next session.

443. The Commission decided that in accordance with the Working Group's recommendation, the outlines and summaries compiled in the document referred

to in paragraph 11 above would be published as an official Commission document in the A/CN.4 series with a view to its inclusion in the Yearbook of the International Law Commission for 1993.

3. Contribution of the International Law Commission to the Decade of International Law

444. In accordance with the arrangements agreed upon at the forty-fourth session 284/ the Working Group set up at that session to consider the question of the contribution of the International Law Commission to the Decade of International Law met under the Chairmanship of Mr. Pellet and discussed the possible contents of a publication containing a number of studies to be prepared by members of the Commission.

445. The Commission noted that the Working Group had proposed the following procedure:

(a) Initially, the Chairman of the Working Group would prepare, on the basis of proposals received and of his own plan, a list of possible topics which, while addressing international legal problems of general interest, could be treated from the standpoint of the Commission;

(b) The list would be distributed to all members of the Commission, who would be invited to indicate whether they were willing to take part in preparing such a publication and, if so, to choose from the list three (alternative) topics on which they were willing to write, it being understood that each author would alone be responsible for the contents of his contribution, which would not commit the Commission as a whole;

(c) In the light of the replies, the Working Group would adopt an overall plan for the publication.

446. The Commission approved those arrangements, and requested the Working Group to submit to the Planning Group of the Enlarged Bureau, in the light of the replies to the invitation referred to in subparagraph (b) above, proposals concerning the plan of the publication and the practical ways and means of carrying out the project.

4. Other matters

447. The Commission observes that commentaries to the articles which it adopts are very important for a proper understanding of the articles and that sufficient time should be allowed for their consideration before they are adopted. The Commission, while expressing full confidence in the Special

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284/ Ibid., para. 374.

Rapporteurs' ability to produce satisfactory commentaries, intends to review the conditions under which the commentaries are discussed and adopted for the possible formulation of guidelines on the matter.

448. The Commission was informed of various steps taken by the Office of Legal Affairs in the framework of its publication programme. It noted that the Handbook on Peaceful Settlement of Disputes had now come out in final form and that a new publication entitled "Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice (1948-1991)" had been issued or was about to be issued in the six working languages of the United Nations. It also noted that a new volume of the United Nations Reports of International Arbitral Awards was in the press, that the backlog in the production of the Juridical Yearbook was gradually being eliminated and that the Official Records of the 1983 Conference on Succession of States in respect of State Property, Archives and Debts and the Official Records of the 1986 Conference on the Law of Treaties between States and International Organizations or between International Organizations, both long overdue, were in the process of being edited and issued in printed form. It finally noted that efforts had continued to be exerted to eliminate the backlog in the Treaty Series and to computerize the contents of the publication entitled "Multilateral Treaties deposited with the Secretary-General" as well as the Treaty Series itself.

449. The Commission took note with appreciation of the efforts made and the results achieved by the Office of Legal Affairs in the implementation of its publication programme, efforts which are particularly welcome in the framework of the current Decade of International Law, which places special emphasis on the teaching, study, dissemination and wider appreciation of international law.

450. As far as the Yearbook of the International Law Commission is concerned, the Commission noted that the Division of Conference Services at the United Nations Office in Geneva and in particular its Official Records Editing Section were now able to produce internally a print quality text at much lower cost and within a considerably shorter time. The new techniques will make it possible to produce the final "printed" version of volume I of the 1991 and 1992 Yearbooks in English, French and Spanish within the next few months and the calendar of production of the other parts of the Yearbook will also be improved.

451. The Commission endorsed the new arrangements made for the production of the Yearbook and expresses its appreciation to the competent services for their innovative spirit.

5. Duration of the next session

452. The Commission wishes to reiterate its view that the requirements of the work for the progressive development of international law and its codification and the magnitude and complexity of the subjects on its agenda make it desirable that the usual duration of the session be maintained. The Commission also wishes to emphasize that it made full use of the time and services made available to it during its current session.

B. Cooperation with other bodies

453. The Commission was represented at the January 1993 session of the Asian-African Legal Consultative Committee, in Kampala, by Mr. Tomuschat as Chairman of the Commission, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. Frank Njenga and by Mr. Baghwat Singh. Mr. Njenga addressed the Commission at its 2304th meeting on 8 June 1993 and his statement is recorded in the summary record of that meeting.

454. The Commission was represented at the December 1993 meeting of the European Committee on Legal Cooperation, in Strasbourg, by Mr. Gudmundur Eiriksson who attended the meeting as observer for the Commission and addressed the Committee on behalf of the Commission. The European Committee on Legal Cooperation was represented at the present session of the Commission by Mr. Carlos de Sola. Mr. de Sola addressed the Commission at its 2312th meeting on 25 June 1993 and his statement is recorded in the summary record of that meeting.

455. The Inter-American Juridical Committee was represented at the present session by Mr. Seymour Rubin. Mr. Rubin addressed the Commission at its 2313th meeting on 29 June 1993 and his statement is recorded in the summary record of that meeting.

C. Date and place of the forty-sixth session

456. The Commission agreed that its next session, to be held at the United Nations Office at Geneva, should begin on 2 May 1994 and conclude on 22 July 1994.

D. Representation at the forty-eighth session of the General Assembly

457. The Commission decided that it should be represented at the forty-eighth session of the General Assembly by its Chairman, Mr. Julio Barboza.

E. International Law Seminar

458. Pursuant to General Assembly resolution 47/33, the United Nations Office at Geneva organized the twenty-ninth session of the International Law Seminar during the current session of the Commission. The Seminar is intended for post-graduate students of international law and young professors or government officials dealing with questions of international law in the course of their work.

459. A Selection Committee under the chairmanship of Professor Christian Dominicé (The Graduate Institute, Geneva) met on 24 March 1993 and, after having considered some 70 applications for participation in the Seminar, selected 24 candidates of different nationalities, mostly from developing countries. All the selected candidates, as well as one UNITAR fellowship holder, were able to participate in this session of the Seminar. 285/

460. The session of the Seminar was held at the Palais des Nations from 1 to 18 June 1993 under the direction of Ms. Meike Noll-Wagenfeld, United Nations Office at Geneva. It was opened by the Chairman of the Commission, Mr. Julio Barboza. During the three weeks of the session, the participants in the Seminar attended the meetings of the International Law Commission and lectures specifically organized for them.

285/ The list of participants in the twenty-ninth session of the International Law Seminar is as follows: Mr. Ignace Atangana Fouda (Cameroon); Mr. Per Augustsson (Sweden); Ms. Valentina Blackman (Barbados); Mr. Ulises Canchola (Mexico); Ms. Feliciah Chatukuta (Zimbabwe) (UNITAR fellowship holder); Mr. Yuri Chekharin (Russia); Ms. Widad El Obied (Sudan); Ms. Susana Fraidenraij (Argentina); Mr. Pramudyo Hendrar (Indonesia); Ms. Irène Kasyanju (Tanzania); Mr. Piotr Kaszuba (Poland); Mr. Agbessi Kokou (Togo); Ms. Jasmina Kovacevic (Croatia); Mr. Andreas Kumin (Austria); Ms. Marja Lehto (Finland); Mr. Raghavachari Muralidharan (India); Mr. Edgar Nassar Guier (Costa Rica); Mr. Kenyatta Nyirenda (Malawi); Mr. Marcos Gustavo Olivares (Peru); Mr. Nelson Olivero (Guatemala); Ms. Chantal Rahalison (Madagascar); Ms. Caroline Seagrove (Australia); Mr. Narendra Man Shrestha (Nepal); Mr. Melencio Sta. Maria (Philippines); Ms. Alisi Numia Taumoepeau (Tonga).

461. Several lectures were given by members of the Commission as follows: Mr. Julio Barboza: "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law"; Mr. Salifou Fomba: "The Trial of 'Blood Crimes' of the former President of Mali and his 32 codefendants"; Mr. Ahmed Mahiou: "The work of the International Law Commission"; Mr. Alain Pellet: "The International Criminal Tribunal for Yugoslavia"; Mr. Robert Rosenstock: "The Law of Non-navigational Uses of International Watercourses"; Mr. Vladlen Vereshchetin: "Long-term Trends in the Evolution of International Law"; Mr. Francisco Villagran Kramer: "The Alvarez Machain Case between Mexico and the USA (1992) - Extradition, Surrender and Kidnapping of Accused Persons in Relation to War Crimes and Common Crimes; Possible Violation of Human Rights and Intervention; Restitution"; Mr. Alexander Yankov: "General Principles of Environmental Law: Recent Developments".

462. In addition, lectures were given by: Mr. Frits Kalshoven (Chairman of the Commission of Experts established pursuant to Security Council resolution 780 (1992)) "The Work of the Commission"; and Mr. Paul Szasz (Legal Adviser, International Conference on the Former Yugoslavia (ICFY) "The Role of the Legal Adviser in the ICFY".

463. As it has become a tradition for the Seminar, the participants enjoyed the hospitality of the Republic and Canton of Geneva. On that occasion, they were addressed by Mr. E. Bollinger, Chief of Information of the Canton.

464. At the end of the session of the Seminar, Mr. Julio Barboza, Chairman of the International Law Commission, and Ms. Noll-Wagenfeld on behalf of the Director-General of the United Nations Office at Geneva, addressed the participants. Mr. Ulises Canchola addressed the Commission on behalf of the participants. In the course of this brief ceremony, each of the participants was presented with a certificate attesting to his or her participation in the twenty-ninth session of the Seminar.

465. The Seminar is funded by voluntary contributions from Member States and through national fellowships awarded by governments to their own nationals. The Commission noted with particular appreciation that the Governments of Austria, Cyprus, Denmark, Germany, Ireland, Mexico, Norway, Sweden, Switzerland and the United Kingdom had made fellowships available, in

particular to participants from developing countries, through voluntary contributions to the appropriate United Nations assistance programme. With the award of these fellowships it was possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 15 participants and partial fellowships (subsistence only) could be given to 3 participants. Thus of the 643 participants, representing 150 nationalities, who have taken part in the Seminar since its inception in 1964, fellowships have been awarded to 342.

466. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. As all the available funds are almost exhausted, the Commission recommends that the General Assembly should again appeal to States which can do so to make the voluntary contributions that are needed for the holding of the Seminar in 1994 with as broad a participation as possible.

467. The Commission noted with regret that in 1993 very limited interpretation services had been made available to the Seminar and it expressed the hope that every effort would be made to provide the Seminar at future sessions with full services and facilities despite existing financial constraints.

F. Gilberto Amado Memorial Lecture

468. With a view to honouring the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the International Law Commission, it was decided in 1971 that a memorial should take the form of a lecture to which the members of the Commission, the participants in the session of the International Law Seminar and other experts in international law would be invited.

469. The Gilberto Amado Memorial Lectures have been made possible through generous contributions from the Government of Brazil. The twelfth Gilberto Amado Memorial Lecture, which was delivered on 2 June 1993 by Pr. Lucius Caflisch (The Legal Counsel, Federal Department of Foreign Affairs, Bern, Switzerland) was on the subject "Peaceful Settlement of International Disputes - New Tendencies". It was followed by a Gilberto Amado dinner.

The Commission hopes that, as previously, the text of the lecture will be printed in English and French and thus made available to the largest possible number of specialists in the field of international law.

470. The Commission expressed its gratitude to the Government of Brazil for its generous contribution which enabled the Gilberto Amado Memorial Lecture to be held in 1993. The Commission requested its Chairman to convey its gratitude to the Government of Brazil.

ANNEX

Report of the Working Group on a draft statute for an international criminal court

A. INTRODUCTION

471. Pursuant to the decision taken by the International Law Commission at its 2298th meeting on 17 May 1993 to reconvene the Working Group on a draft statute for an international criminal court, [286] the Working Group [287] held 22 meetings between 17 May and 16 July 1993. [288]

472. The mandate given by the Commission to the Working Group was in accordance with paragraphs 4, 5 and 6 of General Assembly resolution 47/33 of 25 November 1992. In those paragraphs, the General Assembly had taken note with appreciation of chapter II of the report of the International Law Commission on the work of its forty-fourth session (A/47/10), entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction; had invited States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; and had requested the Commission to continue its work on the question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

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[286] The Commission, at its 2300th meeting on 25 May 1993, decided that the Working Group on the question of an international criminal jurisdiction should, henceforth, be called "Working Group on a draft statute for an international criminal court".

[287] For the composition of the Working Group see paragraph 9 above.

[288] This number does not include the meetings held by the various subgroups referred to in paragraph 475 below.

473. In performing its mandate, the Working Group had before it the report of the Working Group on the question of an international criminal jurisdiction included in the Commission's report at its previous session (A/47/10, Annex); the eleventh report of the Special Rapporteur on the topic "Draft Code of Crimes against the Peace and Security of Mankind", Mr. Doudou Thiam (A/CN.4/449 and Corr.1 English only); the comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction (document A/CN.4/452 and Add.1); chapter B of the topical summary of the discussion held in the Sixth Committee of the General Assembly during the forty-seventh session, prepared by the Secretariat (A/CN.4/446); the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (document S/25704) and a compilation prepared by the Secretariat of draft statutes for an international criminal court elaborated in the past either within the framework of United Nations or by other public or private entities.

474. During the initial meetings, the Group, working as a whole, examined a series of draft provisions dealing with the more general and organizational aspects of a draft statute for an international criminal court, judges, Registrar, composition of chambers, etc., reaching, in many instances, a preliminary understanding on many of the draft provisions or at least on the basis on which a provision on those subject-matters could be drafted.

475. Subsequently, and in order to expedite its work, the Working Group decided to create three subgroups dealing, respectively and primarily with the following subject-matters:

I. Jurisdiction and applicable law
II. Investigation and prosecution
III. Cooperation and judicial assistance.

At a later stage, new subject-matters, identified as pertaining within the statute for an international criminal court, were also distributed among the various subgroups.

476. Further to the discussion of the reports of the various subgroups, which contained draft provisions on the various subject-matters allocated to them, the Working Group produced a preliminary and consolidated draft text for a statute which was submitted for further examination by the Working Group.

477. The preliminary consolidated text elaborated by the Working Group is divided into seven main parts: Part 1 dealing with the establishment and

composition of the court; Part 2 on jurisdiction and applicable law; Part 3 on investigation and commencement of prosecution; Part 4 dealing with the trial; Part 5 on appeal and review; Part 6 on international cooperation and judicial assistance and Part 7 on enforcement of sentences.

478. Some of the provisions or part of some provisions are still between square brackets either because the Working Group could not yet find general agreement either on the contents of the proposed provision or on its formulation, or in order to receive guidance from the General Assembly.

479. In numerous instances, the commentaries to the draft articles explain the special difficulties which the Working Group has encountered in drafting a provision on a given subject-matter, the various views to which it gave rise or the reservations which it aroused.

480. The Working Group feels that the views of the General Assembly would be particularly welcome on the points referred to in the two preceding paragraphs and it proposes that the Commission so indicate in its report to the General Assembly.

481. In laying down the general orientation of the draft statute, the Working Group was guided by the recommendations of the Commission at its preceding session and the report of its Working Group 289/ but also took into account the views expressed thereon by Governments either in the Sixth Committee 290/ or in their written comments. 291/

482. The draft Statute prepared by the Working Group is called "Draft Statute for an International Criminal Tribunal" because, as explained in the commentary to article 5, the Working Group felt that the three organs contemplated in the draft, namely the "court" or judicial organ, the "Registry" or administrative organ and the "Procuracy" or prosecutorial organ had, for conceptual, logistical and other reasons, to be considered in the draft Statute as constituting an international judicial system as a whole.

483. Following is the draft statute for an international criminal court prepared by the Working Group. It is understood that this is a preliminary

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289/ Official Records of the General Assembly, Forty-seventh session, Supplement No. 10 (A/47/10), para. 104 and Annex.

290/ A/CN.4/446, Chapter B.

291/ A/CN.4/452 and Add.1.

version thereof; the Working Group intends to return to it, and finalize work thereon if reconvened by the Commission, at the Commission's next session.

B. DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL AND COMMENTARIES THERETO

PART 1: ESTABLISHMENT AND COMPOSITION OF THE TRIBUNAL

Article 1

Establishment of the Tribunal

There is established an International Criminal Tribunal (hereinafter the Tribunal), whose jurisdiction and functioning shall be governed by the provisions of the present Statute.

Article 2

Relationship of the Tribunal to the United Nations

[The Tribunal shall be a judicial organ of the United Nations.]

[The Tribunal shall be linked with the United Nations as provided for in the present Statute.]

Article 3

Seat of the Tribunal

1. The seat of the Tribunal shall be established at ...

2. The [Tribunal] [Secretary-General of the United Nations] shall, with the approval of [the General Assembly], conclude an agreement with the State of the seat of the Tribunal, which will regulate the relationship between that State and the Tribunal.

Article 4

Status of the Tribunal

1. The Tribunal is a permanent institution open to States parties to the Statute of the Tribunal (hereinafter called the State Parties) and to other States in accordance with this Statute. It shall sit when required to consider a case submitted to it.

2. The Tribunal shall enjoy in the territory of each of the States parties such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Commentary

(1) Part 1 of the draft statute, dealing with the establishment and composition of the Tribunal, may be considered, according to their subject-matter, in several groupings.

(2) Articles 1 to 4 refer to aspects closely linked to the nature of the Tribunal and deal with its establishment (article 1), its relationship with the United Nations (article 2), its seat (article 3) and its status (article 4).

(3) The purpose of the establishment of the Tribunal, contemplated in article 1, is to provide a venue for the fair trial of persons accused of crimes of an international character, in circumstances where other trial procedures may not be available or may be otherwise less preferable.

(4) The brackets around the two paragraphs of article 2 reflect two divergent views expressed in the Working Group, also reflected in the plenary discussion, 292/ on the relationship of the Tribunal to the United Nations. While some members were in favour of the Tribunal becoming an organ of the United Nations, others felt that this might require amendment to the United Nations Charter and advocated another kind of link with this Organization such as a treaty of cooperation along the lines of those between the United Nations and its specialized agencies, a separate treaty providing for the election of judges by the General Assembly, etc. It was generally believed that there would be an advantage in at least some sort of a formal linking between the Tribunal and the United Nations, not only in the authority and permanence which the Tribunal would acquire thereby, but because a part of the court's jurisdiction might depend upon decisions by the Security Council (see draft article 24). In this connection some members pointed out that such a linkage might be conferred by the Tribunal's establishment as a subsidiary organ of the General Assembly, or in such other way as the United Nations might decide, and need not necessarily involve budgetary obligations for, or participation by, all Member States of the United Nations (see draft article 7 on election of judges).

(5) The bracketed portions of paragraph 2 of article 3 and the final language to be chosen are, of course, dependent on the solution to be adopted under article 2.

292/ See supra paras. 60 and 61.

(6) For its part, paragraph 1 of article 4 reflects the virtues of flexibility and cost-reduction advocated by the report of the Working Group at the preceding session of the Commission. While the Tribunal is a permanent institution, it shall sit only when required to consider a case submitted to it (see article 36). Some members felt that the rule according to which the Tribunal shall sit only when required, was incompatible with the necessary permanence, stability and independence of a true international Criminal Tribunal.

Article 5

Organs of the Tribunal

The Tribunal shall consist of the following organs:

(a) The Court, which shall consist of 18 judges elected in accordance with article 7;

(b) The Registry, as provided in article 12;

(c) The Procuracy, as provided in article 13.

Commentary

(1) Article 5 lays down the overarching structure of the international judicial system to be created, which is called "Tribunal" and its component parts, namely, the "Court" or judicial organ, the "Registry" or administrative organ and the "Procuracy", or prosecutorial organ. It was felt in the Working Group that, for conceptual, logistical and other reasons, the three organs had to be considered in the draft statute as constituting an international judicial system as a whole, notwithstanding the necessary independence which has to exist, for ethical and fair trial reasons, between the judicial branch (court) and the prosecutorial branch (procuracy) of that system.

(2) The name "Tribunal" was chosen for designating the international judicial system as a whole because of its well-established credentials in international criminal law, even though in some national criminal systems it might bring connotations of a court of a lower level, which is not, at all, the meaning which the word is given in the present draft statute.

(3) Special care was taken in various articles through the draft statute to refer, as the case may be, to the Tribunal as a whole, or to the Court, in particular.

(4) At its next session in 1994, the Working Group will reconsider the appropriateness of the name provisionally given to the jurisdictional mechanism. At present the overall institution is called the "Tribunal", whereas its specific jurisdictional component is called the "Court". The Working Group wishes to stress that this terminological issue has no substantive importance.

Article 6

Qualifications of judges

The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Court, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 7

Election of judges

1. The judges shall be elected by majority vote of the States parties to this Statute.

2. Each State party may nominate for election one person who possesses the qualifications specified in article 6, and who is willing and able to serve as may be required on the Court.

3. The election of judges shall be by secret ballot.

4. No two judges may be nationals of the same State.

5. States parties should strive to elect persons representing diverse backgrounds and experience, with due regard to representation of the major legal systems.

6. Judges hold office for a term of 12 years and are not eligible for re-election. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.

7. At the first election, 6 judges chosen by lot shall serve for a term of 4 years and are eligible for re-election; 6 judges (chosen by lot) shall serve for a term of 8 years, and the remainder shall serve a term of 12 years.

Article 8

Judicial vacancies

1. In the event of a vacancy, a replacement judge may be elected in accordance with article 7.

2. Judges elected to fill a vacancy shall serve for the remainder of their predecessor's term, and if that period is less than four years, are eligible for re-election for a further term.

Article 9

Independence of judges

In their capacity as members of the Court, the judges shall be independent. Judges shall not engage in any activity which interferes with their judicial functions, or which is likely to affect confidence in their independence. In case of doubt, the Court shall decide.

Article 10

Election and functions of President and Vice-Presidents

1. The President, as well as the first and second Vice-Presidents, shall be elected by the absolute majority of the judges.

2. The President and the Vice-Presidents shall serve for a term of three years or until the end of their term of office on the Court, whichever is earlier.

3. The President and the Vice-Presidents shall constitute the Bureau which, subject to this Statute and the Rules, shall be responsible for the due administration of the Court, and other functions assigned to it under the Statute.

4. The first or second Vice-President, as the case may be, may act in place of the President on any occasion where the President is unavailable or ineligible to act.

Article 11

Disqualification of judges

1. Judges shall not participate in any case in which they have previously been involved in any capacity whatsoever, or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.

2. A judge who feels disqualified under paragraph (1) or for any other reason in relation to a case shall so inform the President.

3. The accused may also request the disqualification of a judge under paragraph 1.

4. Any question concerning the disqualification of a judge shall be settled by a decision of the absolute majority of the chamber concerned. The chamber shall be supplemented for that purpose by the President and the two Vice-Presidents of the Court. The challenged judge shall not take part in the decision.

Commentary

(1) Articles 6 to 11 deal with the first of the three organs making up the international criminal judicial system to be established, namely the Court. They deal with its composition as well as with the status of the judges and the Court's Bureau and cover, in particular, the qualifications of judges (article 6); the election of judges (article 7), judicial vacancies (article 8), the independence of judges (article 9), the election of the Court's President and Vice-Presidents (article 10) and the disqualification of judges (article 11).

(2) As regards article 7, providing for the election of judges by majority vote of the States parties to the Statute it was made clear in the Working Group that, under paragraph 2, a State party could nominate a national of another State party. Article 7 originally contained in its paragraph 3 some terminology between brackets to the effect that the election would be conducted by [the Secretary-General of the United Nations] in accordance with a procedure laid down by the [General Assembly]. Given the lack of definition at this stage and as explained in the commentary to article 2 of the kind of link that the Court will have with the United Nations, the Working Group decided to delete those phrases.

(3) As to the relatively long period of 12 years for the term of office of the judges provided for in paragraph 6 of article 7, it was agreed in the Working Group that this should be considered as a sort of trade-off for the prohibition of their re-election. It was felt that, unlike judges of the International Court of Justice, the special nature of an international criminal institution advocated in favour of the non-re-election principle. The only exceptions are contained in paragraph 7 of article 7 and paragraph 2 of article 8 on judicial vacancies.

(4) In drafting article 9 on independence of the judges, the Working Group took into account, on the one hand, of the desirability that such an independence be effectively ensured and, on the other hand, of the fact that

the projected court is not a full-time body and therefore, in accordance with article 17, judges are not paid a salary but only a daily allowance and expenses related to the performance of their functions. This is why article 9, without ruling out the possibility that the judge may perform other salaried functions (as also contemplated in article 17 (3)), endeavoured to define the criteria concerning activities which might compromise the independence of the judges and from the exercise of which the latter should abstain. For instance, it was clearly understood that a judge of the Court could not be, at the same time, a member or official of the Executive Branch of Government. In case of doubt, the Court shall decide.

(5) Article 10 on election and functions of the President and the Vice-Presidents of the Court is important because they compose the Court's Bureau which is given specific functions under the draft statute. Some members of the Working Group argued strongly that the Court should have a full-time President, who would reside at the seat of the Court and be responsible under the Statute for its judicial functioning. Others stressed the need for flexibility, and the character of the Court as a body which would only be convened as necessary: in their view a requirement that the President be full-time might unnecessarily restrict the range of candidates for the position. It was agreed that the provision would not prevent the President becoming full-time if circumstances required it. The question concerning the possibility of election by postal ballot was discussed in the Working Group and not ruled out, but it was felt that this was a matter for the internal rules of court to decide. Some members also suggested that the internal rules of court could address the matter of possible alternates for the President and Vice-Presidents.

(6) Article 11 on disqualification of judges contains, in its paragraph 1, the general grounds which should lead to the disqualification of a judge in any given case. It was understood in the Working Group that the words "in any case in which they have previously been involved in any capacity whatsoever" covered also the judge's participation in the same case as Prosecutor or defence lawyer. Paragraphs 2 and 3 of the draft article deal with who may initiate the disqualification process, namely the judge himself (para. 2) or the accused (para. 3). The decision, according to paragraph 4, always rests with the chamber concerned, which would be supplemented for that purpose by the President and the two Vice-Presidents of the Court. There was also some

discussion in the Working Group on whether a limit should be placed on the number of judges whose disqualification an accused could request, and on whether the same quorum should be required for disqualifications under paragraph 1 or "for any other reason" under paragraph 2. The Working Group would welcome comments of the General Assembly on both points.

Article 12

Election and functions of Registrar

1. On the proposal of the Bureau the judges of the Court by an absolute majority shall elect the Registrar, by secret ballot, who shall be the principal administrative officer of the Court.

2. The Registrar shall be:

(a) elected for a seven-year term, and eligible for re-election;

(b) shall be available on a full-time basis, but may with the permission of the Bureau exercise such other functions within the United Nations system as are not inconsistent with his office as Registrar.

3. The Bureau may appoint or authorize the appointment of such other staff of the Registry as may be necessary.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar, so far as possible in conformity with the United Nations Staff Regulations and Staff Rules and approved by the Court.

Article 13

Composition, functions and powers of the Procuracy

1. The Procuracy shall be composed of a Prosecutor, who shall be Head of the Procuracy, a Deputy Prosecutor and such other qualified staff as may be required.

2. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. They shall be elected by a majority vote of the States parties to this Statute from among candidates nominated by the States parties thereto for a term of five years and be eligible for re-election.

3. The States parties shall, unless otherwise decided, elect the Prosecutor or Deputy Prosecutor on a standby basis.

4. The Procuracy, as a separate organ of the Tribunal, shall act independently, and shall not seek or receive instructions from any Government or any source.

5. The Prosecutor shall appoint such staff as are necessary to carry out the responsibilities of the office.

6. The Prosecutor, upon receipt of a complaint pursuant to article 28, shall be responsible for the investigation of the crime alleged to have been committed and the prosecution of the accused for crimes referred to in articles 22 and 26.

7. The Prosecutor shall not act in relation to a complaint involving a person of the same nationality. In any case where the Prosecutor is unavailable or disqualified, the Deputy Prosecutor shall act as Prosecutor.

Commentary

(1) Article 12 on election and functions of the Registrar and article 13 on the Composition, functions and powers of the Procuracy deal with the two other organs which compose the international judicial system to be established.

(2) The Registrar, who is elected by the Court, is the principal administrative officer of the Court and is, unlike the judges, eligible for re-election. He performs important functions under the Statute such as notifications, reception of declarations of the Court's jurisdiction, etc. Article 12 regulates not only the election of the Registrar but also the appointment of the Registry staff and the rules which apply to the latter.

(3) As to the Procuracy, provided for in article 13 and composed of the Prosecutor, a Deputy Prosecutor and such other qualified staff as may be required, great emphasis has been placed in the Working Group in the sense that, although being an organ pertaining to the global international judicial system to be created, it should be independent in the performing of its functions and it should be separate from the Court's structure. This is why the article proposes that the election of the Prosecutor and Deputy Prosecutor be carried out not by the Court but by a majority of States parties to the Statute. It should however be noted that paragraph 4 also provides that the Prosecutor shall not seek to receive instructions from any Government or any source, as it acts, really, as a representative of the whole international community.

(4) An earlier version of paragraph 5 contained the words [in consultation with the Bureau] between brackets, in connection with the appointment by the Prosecutor of the staff of the Procuracy. They were deleted because the

Working Group felt that the need to consult with the Court's Bureau for appointing the Procuracy's staff might compromise the Prosecutor's independence. Some members, however, were of the view that the functions of the Court and those of the Procuracy should be related.

(5) Paragraph 6 spells out the main functions of the Prosecutor, namely the investigation of the crime and the prosecution of the accused. Paragraph 7, however, in keeping with the preoccupation of the Working Group to preserve the Prosecutor's independence, provides that the Prosecutor shall not act in relation to complaint involving a person of his/her nationality.

Article 14

Solemn undertaking

Before first commencing to exercise their functions under this Statute, members of the Tribunal shall make a public and solemn undertaking to do so impartially and conscientiously.

Article 15

Loss of office

1. Judges shall not be deprived of their office unless, in the opinion of two thirds of judges of the Court, they have been found guilty of proven misconduct or a serious breach of this Statute.

2. Where the Prosecutor, the Deputy Prosecutor or the Registrar is found in the opinion of two thirds of the Court, guilty of proved misconduct or in serious breach of this Statute, he or she shall be removed from office.

Article 16

Privileges and immunities

1. Judges shall enjoy, while performing their functions in the territory of States parties, the same privileges and immunities as those accorded to judges of the International Court of Justice.

2. Counsel, experts and witnesses shall enjoy, while performing their functions in the territory of States parties, the same privileges and immunities as those accorded to counsel, experts and witnesses involved in proceedings before the International Court of Justice.

3. The Registrar, the Prosecutor, the Deputy Prosecutor and other officers and staff of the Tribunal shall enjoy, while performing their functions in the territory of the States parties the privileges and immunities necessary to the performance of their functions.

4. The judges may, by a majority revoke the immunity of any person referred to in paragraph 3 other than the Prosecutor. In the case of officers and staff of the Tribunal, they may do so only on the recommendation of the Registrar or Prosecutor, as the case may be.

Article 17

Allowances and expenses

1. The President shall receive an annual allowance.

2. The Vice-Presidents shall receive a special allowance for each day they exercise the functions of the President.

3. The judges shall receive a daily allowance during the period in which they exercise their functions, and shall be paid for the expenses related to the performance of their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 9.

Article 18

Working languages

The working languages of the Tribunal shall be English and French.

Commentary

(1) Articles 14 to 18 deal with aspects related to the beginning and end of the judges' functions, and to the work of the judges and the Court and the performing of their functions. They deal with solemn undertaking (article 14), loss of office (article 15), privileges and immunities (article 16), allowances and expenses (article 17) and working languages (article 18).

(2) Article 15 on loss of office contains, in both its paragraphs, essentially the same provision for Judges, the Prosecutor, the Deputy Prosecutor or the Registrar, namely:

(a) removal from office due to proven misconduct; or breach of the Statute, in cases in which

(b) a decision to that effect is taken by two thirds of the judges. Some members observed that this provision differed from the corresponding article of the Statute of the International Court of Justice (article 18) which, in the case of a judge only accepted dismissal if, in the unanimous opinion of the other members of the Court, he had ceased to fulfil the required conditions. One member, in particular, found it strange that the Prosecutor could be removed by an organ different from that which had elected him, and thought that this might compromise his independence before the Court.

(3) Article 16 refers to the privileges and immunities of judges, counsel, experts and witnesses as well as the Registrar, the Prosecutor, Deputy Prosecutor and other officers and staff of the Tribunal, while performing their functions in the territory of States parties to the Court's Statute. For the purposes of privileges and immunities, judges of the Court are equated by article 16 to judges of the International Court of Justice, which according to article 19 of the Court's Statute enjoy diplomatic privileges and immunities when engaged on the business of the Court. An equation with the International Court of Justice is also made in the case of counsel, experts and witnesses. In this connection, article 42 (3) of the Statute of the International Court of Justice states that the agents, counsel and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties. The functional criterion is also used in paragraph 3 of draft article 16 for the privileges and immunities of the Registrar, the Prosecutor and other officers and staff of the tribunal, even though those privileges and immunities may be revoked by a majority of the judges on the recommendation of the Registrar or Prosecutor, as the case may be. To ensure his independence, the immunities and privileges of the Prosecutor cannot be revoked.

(4) Article 17 on allowances and expenses reflects the fact that, while the proposed court would not be a full-time body, its President, as explained in the commentary to article 10, may become full time, if circumstances require it. Hence the distinction between the daily or special allowance proposed for the judges and the vice-presidents and the annual allowance proposed for the President.

(5) Article 18 which makes English and French the working languages of the Tribunal should be read in conjunction with articles 39 and 44 1 (f) and 2.

Article 19

Rules of the Tribunal

1. The Court may by a majority of the judges and on the recommendation of the Bureau, make rules for the functioning of the Tribunal under this Statute, including rules regulating:

(a) the conduct of pre-trial investigations, in particular so as to ensure that the rights referred to in articles 38 to 44 are not infringed;

(b) the procedure to be followed and the rules of evidence to be applied in any trial;

(c) any other matter which is necessary for the implementation of this Statute.

2. Rules of the Tribunal shall forthwith be notified to all States parties, and shall be published.

Article 20

Internal rules of the Court

Subject to this Statute and to the Rules of the Tribunal, the Court has the power to determine its own rules and procedures.

Commentary

(1) Both articles 19 and 20 deal with rule making. Article 19 refers to rules of the Tribunal relating to pre-trial investigations and the conduct of the public trial itself, and it involves matters concerning the respect of the rights of the accused, procedure, evidence, etc. Article 20, on the other hand, refers to rules necessary for the internal functioning of the Court, such as methods of work, ways to conduct the Court's internal sessions, etc.

(2) Great emphasis was placed by some members on the distinction between both kinds of rules and this position predominated in the Working Group. Some members, however, were unconvinced about the existence of a substantive difference between both kinds of rules.

(3) In connection with paragraph 1 (b) of article 19, one member felt that the matter concerning the adoption of rules of evidence was too complex and involved enactment of substantive law. Therefore, it should, in principle, not be part of the Tribunal's competence. It was also observed, by one member, that a provision should be added to the article to the effect that in cases not covered by the Rules on procedure and evidence adopted by the Tribunal, the Tribunal should apply customary standards in this area. Some members felt that paragraph 1 (b) was intended to cover the most fundamental rules and general principles concerning procedure and evidence.

(4) It was understood that article 20 also covered the power of each chamber to elaborate some procedures.

Article 21

Review of the Statute

A Review Conference shall be held, at the request of at least [...] States parties after this Statute has been in force for at least five years:

(a) to review the operation of this Statute;

(b) to consider possible revisions or additions to the list of crimes contained in article 22 by way of a Protocol to this statute or other appropriate instrument and in particular, the addition to that list of the Code of Crimes against the Peace and Security of Mankind, if it has then been concluded and has entered into force.

Commentary

The place of article 21 on "Review of the Statute" is still provisional. The article could be part of the final clauses of the statute. Subparagraph (b) of the draft article is especially related to Section 2 "Jurisdiction and applicable law" as it would provide the basis for enlarging the strand of jurisdiction contained in article 22 (see following paragraphs) incorporating new conventions into its scope, including the draft Code of Crimes Against the Peace and Security of Mankind.

PART 2: JURISDICTION AND APPLICABLE LAW

Article 22

List of crimes defined by treaties

The Court may have jurisdiction conferred on it in respect of the following crimes:

(a) genocide and related crimes as defined by articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;

(b) grave breaches of:

- (i) The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by article 50 of that Convention;
- (ii) The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by article 51 of that Convention;

(iii) The Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by article 130 of that Convention;

(iv) The Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by article 147 of that Convention;

(v) Protocol I additional to the Geneva Conventions of 12 August 1949 and relating to the protection of Victims of International Armed Conflicts of 8 June 1977, as defined by article 85 of that Protocol;

(c) the unlawful seizure of aircraft as defined by article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970;

(d) the crimes defined by article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971;

(e) apartheid and related crimes as defined by article 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973;

(f) the crimes defined by article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973;

(g) hostage-taking and related crimes as defined by article 1 of the International Convention against the Taking of Hostages of 17 December 1979;

(h) the crimes defined by article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and by article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, both of 10 March 1988.

Commentary

(1) Part 2 of the draft Statute, dealing with jurisdiction and applicable law, is the central core of the draft statute. From the point of view of the crimes which may give rise to the Court's jurisdiction, articles 22 to 26 lay down, basically, two strands of jurisdiction, which are based on a distinction drawn by the Working Group between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. An example of the first category of treaties is the International Convention against the taking

of Hostages of 17 December 1979. 293/ Examples of the second category of treaties are the Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft of 14 September 1963 294/ as well as all treaties dealing with the combating of drug-related crimes, including the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988. 295/

(2) Articles 22, 23 and 24 are devoted to the first strand of jurisdiction mentioned above. The crimes and the treaties concerned under this strand of jurisdiction are listed in article 22. In the view of the Working Group, the two main criteria which led to considering the crimes contemplated in the treaties listed in article 22 as crimes under international law were (a) the fact that the crimes are themselves defined by the treaty concerned in such a way that an international criminal court could apply a basic treaty law in relation to the crime dealt with in the treaty and (b) the fact that the treaty created, with regard to the crime therein defined, either a system of universal jurisdiction based on the principle aut dedere aut judicare or the possibility that an international criminal tribunal try the crime, or both.

(3) Subparagraph (b) of article 22 does not include the 1977 Protocol II of the 1949 Geneva Conventions on Humanitarian Law because this protocol contains no provision concerning grave breaches.

(4) Article 22 does not list the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989 296/ because this Convention is not yet in force. If the Convention came into force before the Statute is adopted, consideration could be given to adding the Convention to the list. In that case the following additional paragraph would be appropriate:

293/ United Nations, Treaty Series, vol. 1316, p. 205.

294/ Ibid., vol. 704, p. 219.

295/ Document of the United Nations Economic and Social Council E/CONF.82/15/Corr.1 and Corr.2 (English only); and depositary notification C.N.31.1990.TREATIES-1 of 9 April 1990 (procès-verbal of rectification of original French and Spanish texts).

296/ Adopted by General Assembly resolution A/44/34.

"(i) crimes related to mercenaries as defined by articles 2, 3 and 4 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989."

(5) As to drug-related crimes, including the crimes referred to in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 297/ for the reasons expressed under paragraphs (1) and (2) above, they have not been listed in article 22, even though the international criminal Court may acquire jurisdiction in their respect under the other strand of jurisdiction contemplated in article 26 (2) (b).

(6) Some members, for the reasons explained in the commentary to article 26, felt that the crimes dealt with in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances met all the characteristics to be included in the list of article 22. Some members also felt that the crime of torture as contemplated in the Convention against the Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 298/ also qualified for inclusion in that list.

Article 23

Acceptance by States of jurisdiction over crimes listed in Article 22

Alternative A

1. A State party to this Statute may, by declaration lodged with the Registrar, at any time accept the jurisdiction of the Court over one or more of the crimes referred to in article 22.

2. A declaration made under paragraph (1) may be limited to:

(a) particular conduct alleged to constitute a crime referred to in article 22 or

(b) conduct committed during a particular period of time, or may be of general application.

3. A declaration may be made under paragraph (1) for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case six months' notice of withdrawal must be given to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

297/ See *supra* note 295.

298/ Adopted by General Assembly resolution 39/46.

4. A State not a party to this Statute may, by declaration lodged with the Registrar, at any time accept the jurisdiction of the Court over a crime referred to in article 22 which is or may be the subject of a prosecution under this Statute.

Alternative B

1. Unless it makes the declaration provided for in paragraph 2, a State becoming party to this Statute is deemed to have accepted the jurisdiction of the Court over any crime referred to in article 22, if it is a party to the treaty which defines that crime.

2. A State party to the present Statute may, by declaration lodged with the Registrar, indicate that it does not accept the jurisdiction of the Court over one or more of the crimes referred to in paragraph 1.

3. The declaration may be made on the ratification of or accession to the Treaty embodying this Statute or at any time thereafter, in which case it shall come into effect 90 days after being made and it shall not affect any proceedings already commenced under this Statute.

4. Declarations may be withdrawn at any time, with immediate effect.

Alternative C

1. A State party to this Statute may, by declaration lodged with the Registry, at any time accept the jurisdiction of the Court.

2. Unless otherwise specified, a declaration of acceptance under paragraph 1 shall be deemed to confer jurisdiction on the Court with regard to all of the crimes listed in article 22.

3. A declaration of acceptance under paragraph (1) may be limited to: (the rest of the provision as in paragraphs 2, 3 and 4 of Alternative A).

Commentary

(1) Article 23 deals with the ways and modalities in which States may accept the Court's jurisdiction over crimes listed in article 22.

(2) The system set out in Alternative A could be characterized as an "opting in" system whereby jurisdiction over certain crimes is not conferred automatically on the Court by the sole fact of becoming a part to the Statute but, in addition, a special declaration is needed to that effect. Some members were of the view that this approach was the one which best reflected the consensual basis of the Court's jurisdiction and best translated into a formulation the flexible approach to the Court's jurisdiction which characterized the recommendations of the Working Group at the Commission's previous session.

(3) In this connection, paragraphs 1, 2 and 3 of Alternative A deal with acceptance by State parties to the Court's Statute and to the respective treaties concerned. Paragraph 1 provides for the possibility of a general declaration very much along the lines of the optional clause contained in article 36 of the Statute of the International Court of Justice. Such declaration, according to paragraph 2, may be general or subject to certain limitations ratione materiae or ratione temporis. In the latter case, however, paragraph 3 provides for certain restrictions inspired by the principle of good faith. For its part, paragraph 4 of Alternative A deals with the possible acceptance of the Court's jurisdiction over the crimes referred to in article 22, by States parties to the respective treaties concerned which are not parties to the Court's Statute.

(4) Some other members did not believe that the consensual basis of the Court's jurisdiction or the recommendations of the Working Group at the Commission's previous session necessarily led to a system like the one laid down in Alternative A. They preferred an approach which, in their view, rendered more meaningful the status of being a party to the Court's Statute. They advocated a system whereby a State, by becoming party to the Court's Statute, would automatically confer jurisdiction to the Court over the crimes listed in article 22, although they would have the right to exclude some crimes from such jurisdiction (opting out system). Alternatives B and C are possible formulations discussed in the Working Group based on this other approach to the Court's jurisdiction.

(5) The Working Group presents these alternatives to the Commission, recommending that they be transmitted to the General Assembly in order to obtain some guidance as to the system to be adopted.

Article 24

Jurisdiction of the Court in relation to Article 22

1. The Court has jurisdiction under this Statute in respect of a crime referred to in article 22 provided that its jurisdiction has been accepted under article 23:

(a) by any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts;

(b) in relation to a suspected case of genocide, by any State party to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948.

2. If the suspect is present on the territory of the State of his nationality or of the State where the alleged offence was committed, the acceptance of the jurisdiction of the Court by that State is also required.

Commentary

(1) Article 24 spells out the States which have to accept the Court's jurisdiction in a given case under article 22 for the Court to have jurisdiction, in other words, which States have to consent.

(2) The general criterion recommended by the Working Group which is laid down in paragraph 1 (a) of the article is that the Court has jurisdiction over a certain crime provided that any State which would normally have jurisdiction under the relevant treaty to try the suspect of that crime before its own courts, has accepted the Court's jurisdiction under article 23. This paragraph should be read in conjunction with article 63 on surrender of an accused person to the Tribunal, in particular its paragraph 3, and the commentary thereto.

(3) A special mention is made of the Genocide Convention 299/ in paragraph 1 (h) because unlike other treaties listed in article 22, the Genocide Convention is not based on the principle "aut dedere aut judicare" but on the principle of territoriality. Article VI of that Convention provides that persons charged with genocide or any of the other acts enumerated in the Convention shall be tried by a competent tribunal of the State in the territory of which the act was committed. However, as a counterpart to the non-inclusion of the principle of universality in the Convention, article VI also provides that the aforementioned persons could also be tried by such international penal tribunal as may have jurisdiction with respect to those contracting Parties which shall have accepted its jurisdiction. This can be read as an authority by States parties to it who are also parties to the Statute to allow an international criminal court to exercise jurisdiction over an accused who has been transferred to the Court by any State. The travaux of article VI support that interpretation. 300/

299/ United Nations, Treaty Series, vol. 78, p. 277.

300/ See Report of the Ad Hoc Committee on Genocide, 5 April-10 May 1948 (ECOSOC Official Record 3rd year 7th session Supp. No. 6 (E/794, 1948) 11-12).

(4) The consent of the State which, having jurisdiction under the relevant treaty to try the suspect for that crime under its own courts, prefers nevertheless to initiate proceedings before the Court, does not suffice for the Court to have jurisdiction, if the accused, not being in the territory of that State is, instead, present either on the territory of the suspect's State of nationality or on the territory of the State where the alleged crime was committed. In such a case, for the Court to have jurisdiction, the acceptance of the jurisdiction or other expression of consent of one or the other of those two States, as the case may be, is also necessary.

Article 25

Cases referred to the Court by the Security Council

> Subject to article 27, the Court also has jurisdiction under this Statute over cases referred to in Articles 22 or 26 (2) (a) which may be submitted to it on the authority of the Security Council.

Commentary

(1) Article 25, as clearly arises from its text, does not constitute a separate strand of jurisdiction from the point of view of the kind of crimes which may give rise to the Court's jurisdiction. It, rather, broadens the category of subjects which may bring to the Court the crimes referred to in articles 22 and 26 (2) (a), by providing the Security Council of the United Nations also with this right. The Working Group felt that a provision such as this one was necessary in order to enable the Security Council to make use of the Court, as an alternative to establishing tribunals ad hoc.

(2) Some members expressed concern that article 25 might imply conferring on the Security Council a power which, in their view, it should not normally have, namely that of identifying specific persons as suspects of a crime of aggression and bringing specific charges against them. In this connection, it was understood in the Working Group that the Security Council would not normally be expected to refer a "case" in the sense of a complaint against named individuals, but would more usually refer to the Tribunal a situation of aggression, leaving it to the Tribunal's own Prosecutor to investigate and indict named individuals.

(3) Some members were of the view that the power to refer cases to the Court under article 25 should also be conferred to the General Assembly, particularly in cases in which the Council might be hampered in its actions by the veto.

Article 26

Special acceptance of jurisdiction by States in cases not covered by Article 22

1. The Court also has jurisdiction under this Statute in respect of other international crimes not covered by Article 22 where the State or States identified in paragraph (3) notify the Registrar in writing that they specially consent to the Court exercising, in relation to that crime, jurisdiction over specified persons or categories of persons.

2. The other international crimes referred to in paragraph (1) are:

(a) a crime under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals;

(b) crimes under national law, such as drug-related crimes, which give effect to provisions of a multilateral treaty, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, aimed at the suppression of such crimes and which having regard to the terms of the treaty constitute exceptionally serious crimes.

3. The State or States referred to in paragraph (1) are:

(a) in relation to a crime referred to in paragraph (2) (a), the State on whose territory the suspect is present, and the State on whose territory the act or omission in question occurred;

(b) in relation to a crime referred to in paragraph (2) (b), the State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts.

Commentary

(1) Article 26 lays down the second strand of jurisdiction referred to at the beginning of section 2 of the present draft statute, in the commentary to article 22 above. It allows States concerned to confer jurisdiction on the Court in respect of other international crimes not covered by article 22 when they specially consent to the Court exercising, in relation to that crime,

jurisdiction over specified persons or categories of persons. The two categories of crimes envisaged by this article are contemplated in its paragraph 2.

(2) Paragraph 2 (a) refers to "crimes under general international law" and defines this category, probably for the first time in connection with individual responsibility, as "crimes under a norm of international law accepted and recognized by the international community of States as a whole as being of such fundamental character that its violation gives rise to the criminal responsibility of individuals". This paragraph is intended to cover international crimes which have their basis in customary international law and which would otherwise not fall within the Court's jurisdiction ratione materiae such as aggression, which is not defined by treaty, genocide, in the case of States not parties to the Genocide Convention, 301/ or other crimes against humanity not covered by the 1949 Geneva Conventions. 302/ It seemed inconceivable to the Working Group that, at the present stage of development of international law, the international community would move to create an international criminal court without including crimes such as those mentioned above, under the Court's jurisdiction.

(3) It is to be noted in this connection that the report of the Secretary-General relating to the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia (document S/25704 and Add.1), which was approved by Security Council resolution 827 on 25 May 1993, considers the following instruments as conventional international law which has beyond doubt become part of customary international law: the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of

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301/ United Nations, Treaty Series, vol. 78, No. 1021, p. 277.

302/ For the four Geneva Conventions see, ibid., vol. 75, Nos. 970-973.

18 October 1907; 303/ the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; 304/ and the Charter of the International Military Tribunal of 8 August 1945. 305/

(4) Some members, however, expressed reservations on paragraph 2 (a). A possible alternative, which attracted some support in the Working Group, would be to delete paragraph 2 (a) and to cover the problem by Article 25, that is to say by allowing such crimes to be referred to the Court by the Security Council. In the case of the crime of aggression, this would be a solution which took account of the fact that a determination of aggression by a State, which would be a pre-condition to individual responsibility of those engaged in the planning or waging of a war of aggression, would in any event rest with the Security Council. Moreover, this would not be inconsistent with the Nuremberg Judgement, which considered crimes against humanity only to the extent that such crimes were linked to crimes against the peace (aggression) or war crimes proper. If this solution were adopted Article 25 would have to read "over cases of the kind referred to in Articles 22 or 26, or over crimes under general international law, which may be submitted ...".

(5) The other category of crimes contemplated by article 26 is contained in paragraph 2 (b) and is related to the distinction referred to in paragraphs 1 and 2 of the commentary to article 22, between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. The latter category is defined by the paragraph as "crimes under national law ... which give effect to a provision of a multilateral treaty ... aimed at the suppression of such crimes, and which having regard to the terms of the treaty constitute an exceptionally serious crime".

(6) Given the process whereby the question of the possible creation of an international criminal court was sent by the General Assembly to the International Law Commission, the Working Group believes it is especially

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303/ Carnegie Endowment for International Peace, The Hague Conventions and Declarations of 1899 and 1907 (New York, Oxford University Press, 1915), p. 100.

304/ United Nations, Treaty Series, vol. 78, No. 1021.

305/ Ibid., vol. 82, No. 251.

important to note that this is the provision through which the international criminal court could acquire jurisdiction to deal with drug-related crimes, and this is also why such crimes as well as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, 306/ receive special mention in the paragraph. It is also to be noted, however, that in order to prevent the Court from being overwhelmed with minor cases, the subparagraph has placed a limit, by restraining the category to crimes which "having regard to the terms of the treaty constitute(s) an exceptionally serious crime".

(7) Some members of the Working Group expressed serious reservations with regard to this approach which included drug-related crimes in a separate strand of jurisdiction from those crimes contemplated by article 22. In their view, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 307/ could be equated to the Conventions listed in article 22 of the draft Statute under any of the following criteria: (a) The constitution of the offence as a crime under international law; (b) the provisions designed to make the offence punishable under internal law; (c) provisions concerning jurisdiction over the crime by States other than those in whose territory the crime was committed; (d) provisions requiring prosecution and trial of the offender present in the State's territory if the latter decides not to extradite (aut dedere aut judicare) and (e) provisions concerning extradition and mutual legal assistance. In view of the foregoing, it was suggested to include the aforementioned Convention in the list contained in article 22. Other members disagreed mainly on two grounds: (a) drug-related crimes referred to in the aforementioned Convention were not sufficiently defined in the Convention for them to constitute a basic treaty law to be applied directly by the Court without reference to national law, and (b) the obligation to try or extradite provided for in that Convention would function not simply on the basis of the sole operation of the Treaty provisions but only between parties which would have made crimes referred to in the Convention punishable under their internal laws.

306/ See supra note 295.

307/ Ibid.

(8) As to the consent of which State or States is required for the jurisdiction of the Court to be effective under article 26, two different criteria have been recommended by the Working Group. For crimes under national law which give effect to a provision of a multilateral treaty aimed at the suppression of such crimes, the criterion recommended is that the only consent required for the Court to have jurisdiction is that of the State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts.

(9) More restrictive is the criterion recommended as regards crimes under general international law. In this case, the Working Group recommends that both the consent of the State on whose territory the suspect is present and that of the State on whose territory the act or omission in question occurred be required, for the Court to have jurisdiction.

Article 27

Charges of aggression

> A person may not be charged with a crime of or directly related to an act of aggression under articles 25 or 26 (2) (a) unless the Security Council has first determined that the State concerned has committed the act of aggression which is the subject of the charge.

Commentary

Article 27

(1) Article 27 sets out the relationship between the Security Council and the proposed international criminal court. The Working Group was of the view that, if an act of aggression occurs, the responsibility of an individual would pre-suppose that a State had been held to be guilty of aggression, and such a finding would be for the Security Council to make. The consequential issues of whether an individual could be indicted, as having acted on behalf of that State and in such a capacity as to have played a part in the planning and waging of the aggression would be for the Court to decide.

(2) In an earlier version of the draft statute, the present article constituted a second paragraph to article 25. The Working Group decided to transform that paragraph into an independent article to be placed after article 26, in order to show clearly that the proposed relationship between the Security Council and the Court, if an act of aggression occurs, would apply not only in prosecutions under article 25 (at the initiative of the

Security Council) but also in prosecutions under article 26 (2) (a) in which charges of aggression against a person might conceivably be brought by a State.

Article 28

Applicable law

The Court shall apply:

(a) this Statute;

(b) applicable treaties and the rules and principles of general international law;

(c) as a subsidiary source, any applicable rule of national law.

Commentary

(1) The first two sources of applicable law mentioned by the draft article are the present Statute and applicable treaties. It is understood that, in cases of Court's jurisdiction on the basis of article 22, the indictment will specify the charges brought against the accused by reference to particular treaty provisions, which will, subject to the Statute, provides the bases in any prosecution.

(2) The mention of the rules and principles of general international law is particularly relevant in the light of paragraph 2 (a) of article 26. Furthermore, it is also understood that the expression "rules and principles of general international law" include "general principles of law", so that the Court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.

(3) The mention in the draft article of "any applicable rule of national law" also acquires special importance in the light of paragraph 2 (b) of article 26.

PART 3: INVESTIGATION AND COMMENCEMENT OF PROSECUTION

Article 29

Complaint

Any State Party with jurisdiction over a particular crime under the terms of an international convention and which has accepted the jurisdiction of the Court pursuant to article 23 of the Statute with respect to the crime or other State with such jurisdiction and which has accepted the jurisdiction of the Court pursuant to article 23; or any State which has consented to the Court's jurisdiction under article 26; or the Security Council pursuant to article 25; may by submission to the Registrar bring to the attention of the Court in the form of a complaint, with such supporting documentation as it deems necessary, that a crime, within the jurisdiction of the Court, appears to have been committed.

Commentary

(1) The International Criminal Tribunal is envisaged as a facility that would be available to States Parties to its Statute, other States and the Security Council. The complaint is the mechanism that would invoke this facility and initiate the preliminary phase of the criminal procedure. Such a complaint may be filed by any State which has jurisdiction over the crime and has accepted the jurisdiction of the Court with respect to that crime. To meet the first requirement, the State must have jurisdiction over the crime under a treaty listed in article 22 to which it is a party, under customary law, or under its national law. To meet the second requirement, the State must also have accepted the jurisdiction of the Court with respect to the crime either as a State Party to the Statute or as a State not a party thereto, in accordance with article 23.

(2) The Working Group considered limiting resort to the Tribunal to States Parties to the Statute to encourage States to accept the rights and obligations provided for therein and to share in the financial burden relating to the operating costs of the Tribunal, a matter which has yet to be worked out. In some respects, this approach seemed appropriate for a tribunal established by means of a treaty. However, the Working Group felt that the interests of the international community in providing a universal mechanism for prosecuting, punishing and deterring international crimes wherever they occur weighed in favour of making this particular treaty institution available to all States in accordance with the provisions of this article.

(3) In the light of the primary responsibility of the Security Council for the maintenance of international peace and security under the United Nations Charter, the Council would also be entitled to invoke the Tribunal and initiate criminal proceedings with respect to international crimes under conventional or customary law, in accordance with the functions and powers conferred on the Council by the Charter. While recognizing the circumstances which led the Security Council to establish an ad hoc tribunal to prosecute

persons for crimes committed in the former Yugoslavia, the Working Group believed that it would be preferable for the Security Council to be able to refer such matters to an existing institution.

(4) One member suggested that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint if it appears that a crime apparently within the jurisdiction of the Court may otherwise not be duly investigated. However, other members felt that the investigation and prosecution of the crimes covered by the Statute should not be undertaken in the absence of the backing of a State or the Security Council, at least not at the present stage of development of the international legal system.

(5) The complaint, which is to be submitted to the Registrar, is intended to bring to the attention of the Tribunal the apparent commission of a crime within its jurisdiction. The complaint must be accompanied by supporting documentation for the following reasons. First, the Tribunal is envisaged as a mechanism that should be available whenever necessary, but which should not be activated unless there is reason to do so. Given the personnel required and the costs involved in a criminal prosecution, the institution should not be invoked on the basis of frivolous, groundless or politically motivated complaints. Second, the Prosecutor must have the necessary information to begin an investigation. This is not to suggest that the complaint should establish a prima facie case, but rather that it should include sufficient information and supporting documentation to demonstrate that a crime has apparently been committed and to provide a starting point for the investigation.

(6) During the investigation and pre-trial phase, the Bureau of the Court would perform various judicial functions, in addition to its administrative functions, that it might otherwise assign to a Chamber of the Court depending on the number of cases referred to the Tribunal. The Tribunal was envisaged as a permanent institution which would only function when called upon to do so in a particular case. Depending on the caseload, it may be necessary for the Bureau to convene one or more Chambers to perform functions relating to investigations and pre-trial proceedings, such as those relating to requests for arrest warrants or orders as well as reviewing indictments. This may be required to ensure timely consideration of requests by the Prosecutor for orders essential to conducting investigations and prosecutions as well as to ensure the right of the accused to be tried without undue delay once the

indictment has been confirmed. One member also suggested the possibility of establishing an Indictment Chamber consisting of 3 judges, assuming that the number of complaints referred to the Tribunal justified the establishment of such a Chamber.

Article 30

Investigation and preparation of the indictment

1. The Prosecutor shall, upon receipt of a complaint in accordance with article 29 and unless the Prosecutor determines that no possible basis exists for action by the Court, initiate investigations. The Prosecutor shall assess the information obtained and decide whether there is sufficient basis to proceed. The Prosecutor shall inform the Bureau of the Court of the nature and basis of the decision taken. In the case of a decision by the Prosecutor not to proceed, the Bureau, acting as a Review Chamber, and at the request of the complainant State or the Security Council, shall have the power to review the decision and if it finds that there is sufficient basis, direct the Prosecutor to commence a prosecution.

2. The Prosecutor shall have the power to request the presence of and to question suspects, victims and witnesses, to collect evidence, including the disclosure and production of any documentation or exhibits relevant to the complaint, and to conduct on-site investigations.

3. In carrying out these tasks, the Prosecutor may, as appropriate, seek the cooperation of any State in a position to provide assistance and shall have the authority to request the Court to issue such subpoenas and warrants as may be required, including for the arrest and detention of a suspect.

4. A person suspected of a crime shall:

(a) Prior to being questioned in an investigation under the Statute, be informed of the right to remain silent without such silence being a consideration in the determination of guilt or innocence, and of the right to have the assistance of counsel of the suspect's choice or, in the absence of means to retain counsel, to have counsel and legal assistance assigned to the suspect by the Court;

(b) Not be compelled to testify or to confess guilt;

(c) If questioned in a language other than a language the suspect understands and speaks, be provided with competent interpretation services, and translations of documents on which the suspect is to be questioned.

Commentary

(1) The Prosecutor, upon notification by the Registrar of the receipt of a complaint, is responsible for the investigation and the prosecution of the

alleged crime, as provided in article 13. The Prosecutor must, in consultation with the Bureau, appoint the qualified staff required to conduct the investigation of the alleged crime pursuant to article 13 and initiate the investigation, unless the Prosecutor reviews the complaint and supporting documentation and concludes that there is no possible basis for such an investigation. While most members felt that the Prosecutor should be required to conduct at least a preliminary investigation of a complaint filed by a State or the Security Council, one member questioned setting the Tribunal machinery in motion if the complaint was completely groundless.

(2) In conducting the investigation, the Prosecutor would have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. The Prosecutor may seek the cooperation of any State and request the Court to issue orders to facilitate the investigation. During the investigation, the Prosecutor may request the Bureau to issue such orders on behalf of the Court since a Chamber may not be convened until a later stage when the investigation has produced sufficient information for an indictment and confirmed the probability of a trial, assuming that the presence of the alleged perpetrator is secured or not required according to paragraph 1 (h) of article 44.

(3) At the investigation phase of a criminal proceeding, a person who is suspected of having committed a crime may be questioned concerning the allegations. Prior to questioning, the suspect must be informed of the following rights: the right not to be compelled to testify or to confess guilt; the right to remain silent without reflecting guilt or innocence; the right to have the assistance of counsel, freely chosen or provided, if necessary, during questioning; and the right to interpretation during questioning, if necessary.

(4) There is some overlap between the provisions concerning the rights of the suspect, a person believed to have committed a crime but not yet charged, and the rights of the accused, a person formally charged with the crime in the form of an indictment, under this Statute. However, the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation, for example the right not to be compelled to confess to a crime. Thus, the Working Group felt that it was important to include a separate provision to guarantee the rights of a person during the investigation phase before the person has actually been charged

with a crime. It is also necessary to distinguish between the rights of the suspect and the rights of the accused since the former are not as extensive as the latter. For example, the suspect does not have the right to examine witnesses or to be provided with all incriminating evidence, rights which are guaranteed to the accused under article 44, paragraphs 1 (d) and 3.

(5) Following the investigation, the Prosecutor must assess the information obtained and decide whether or not there is a sufficient basis to proceed with the preparation of an indictment for which the Prosecutor must establish a prima facie case. The Prosecutor must inform the Bureau of the nature and basis of the decision taken. The Bureau may, at the request of the complainant State or the Security Council, review a decision of the Prosecutor not to prepare an indictment and proceed with the prosecution and may also direct the Prosecutor to do so if the Court finds that there is a sufficient basis for such action. This reflected the view that there should be a judicial review of the Prosecutor's decision not to proceed with a case, assuming that the complainant State or the Security Council was sufficiently convinced of the matter to request such a review. However, other members believed that such a review was inconsistent with the independence and the discretion of the Prosecutor in deciding, based on his or her experience and expertise, whether the results of the investigation warranted further action. They also raised practical questions concerning the effectiveness of requiring the Prosecutor to proceed with a case under such circumstances.

Article 31

Commencement of prosecution

1. Upon a determination that there is a sufficient basis to proceed, the Prosecutor shall prepare an indictment containing a statement giving particulars of the facts and indicating the crime or crimes with which the accused is charged under the Statute.

2. Prior to an indictment by the Court, a person may be arrested or detained under the Statute, for such period as may be determined by the Court in each case, only pursuant to:

(a) A determination by the Court, that such arrest or detention is necessary because there is sufficient ground to believe that such person might have committed a crime within the jurisdiction of the Court; and, unless so arrested the person's presence at trial cannot be assured; and

(b) The issuance of a warrant or other order of arrest or detention by the Court.

Commentary

While the complaint is the mechanism that initiates the investigation of the alleged crime, the indictment is the mechanism that initiates the prosecution of the criminal case. Following a determination that the information obtained during the investigation confirms that the crime alleged in the complaint has apparently been committed by the suspect, the Prosecutor shall proceed with the preparation of an indictment stating the relevant facts and the crime or crimes that the person to be charged is alleged to have committed under the Statute. Prior to the affirmation of the indictment, the Court, namely the Bureau or possibly a Chamber acting on behalf of the Court, may order the arrest or detention of the suspect on the basis of a preliminary determination that there are sufficient grounds for the charges and a risk that the person's presence at trial cannot otherwise be assured. The person shall be detained for a period to be determined by the Court in each case.

Article 32

The indictment

1. The indictment together with the necessary supporting documentation shall be submitted by the Prosecutor to the Bureau of the Court.

2. The Bureau, acting as an Indictment Chamber, shall examine the indictment and determine whether or not a *prima facie* case exists.

3. If the Bureau concludes that a *prima facie* case exists, it shall affirm the indictment and convene a Chamber in accordance with article 37.

4. On affirming the indictment, the Bureau may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention or surrender of persons, and any other orders as may be required for the conduct of the trial.

Commentary

(1) The Prosecutor submits the indictment and necessary supporting documentation to the Court. The Bureau of the Court, acting as an Indictment Chamber, reviews the indictment and decides whether it provides *prima facie* evidence of the crime alleged to have been committed by the person named in the indictment. If the Bureau concludes that the Prosecutor has established a *prima facie* case, then the Bureau affirms the decision to charge contained in the indictment and convenes a Chamber, in accordance with article 37, to conduct the trial. It is at this point in time, when the indictment is

affirmed by the Court, that the person is formally charged with the crime and the former "suspect" becomes the "accused". Once the indictment has been affirmed, the Bureau may issue an arrest warrant or other orders requested by the Prosecutor which may be required for the prosecution and conduct of the trial. However, the Chamber would assume responsibility for pre-trial orders and other matters relating to the trial once it is convened.

(2) Some members although accepting the principle that the indictment prepared by the Prosecutor should be subject to review and affirmation by the judicial organ of the Tribunal, also felt that this affirmation of the decision to charge the accused on the basis of a prima facie case should in no way be perceived as a pre-judgement by the Court as a whole on the final determination of the guilt or innocence of the accused. For this reason, they believed that careful consideration should be given to the appropriate organ of the Court to be entrusted with reviewing and determining the sufficiency of the indictment.

Article 33

Notification of the indictment

States parties to the Statute

1. The Court, with a view to ensuring prompt notification of an indictment to the accused, shall immediately following the issuance of an indictment:

(a) notify all States parties of the indictment and of any order relating to the accused that may have been issued by the Court; and

(b) transmit to the State Party, or States parties, within whose jurisdiction the accused is then believed to be:

(i) the indictment and any order relating to the accused that may have been issued by the Court;

(ii) a copy of the Statute of the Court;

(iii) a copy of the rules of evidence and procedure of the Court;

(iv) a statement of the accused's right to obtain legal assistance as set out in article 44, paragraph 1 (b) of the Statute; and

(v) if one of the working languages of the Tribunal is not the principal language understood and spoken by the accused, a translation under the auspices of the Tribunal of the indictment and other documents referred to in the preceding subparagraphs.

2. Where the State party or States parties, within whose jurisdiction the accused is believed to be, have accepted the jurisdiction of the Court with respect to such crimes as are the subject of the indictment, the Court shall order such State Party, or States parties:

(a) to ensure that the indictment, together with the other documents referred to in paragraph 1 of this article, are personally notified to the accused; and

(b) if an order for the arrest or detention of the accused has been issued by the Court, to ensure that the accused is arrested or detained immediately following such notification.

3. Where the State Party or States parties, within whose jurisdiction the accused is believed to be, have not accepted the jurisdiction of the Court with respect to such crimes as are the subject of the indictment, the Court shall request such State or States:

(a) to cooperate with the Tribunal in having the indictment and other documents personally notified to the accused; and

(b) if an order for the arrest or detention of the accused has been issued by the Court, to cooperate in obtaining the arrest or detention of the accused.

States not parties to the Statute

4. Where the State or States, within whose jurisdiction an accused is believed to be, are not parties to the Statute, the Court shall with a view to prompt notification of an indictment to the accused and, where necessary, the arrest or detention of the accused, immediately following the issuance of an indictment:

(a) notify such State or States of the indictment and of any order of the Court relating to the accused;

(b) transmit to such State or States copies of the indictment and other documents referred to in subparagraph 1 (b) of the present article; and

(c) invite such State or States:

(i) to cooperate with the Tribunal in having the indictment and other documents personally notified to the accused; and

(ii) if an order for the arrest or detention of the accused has been issued by the Court, to cooperate in obtaining the arrest or detention of the accused.

Cases where personal notification of the indictment may not be feasible

5. If personal notification of the indictment, together with the other documents, is not made to the accused within a period of sixty days after the indictment, the Court shall prescribe such other manner of bringing the indictment to the attention of the accused.

Commentary

(1) To ensure that the accused is promptly notified of the indictment, the Court shall immediately notify all States parties to the Statute of the indictment and any related orders and transmit the indictment and other relevant documents to the State party in whose territory the accused is believed to be located, according to article 33. In the latter case, the documents are provided to the State party with a view to their transmission to the accused at such time as the person is located and taken into custody. Thus, the accused is not only to be served with the indictment but also provided with documents necessary for the preparation of the defence, including a statement explaining the right to counsel, the Statute setting forth the rights of the accused and the trial procedures, and the rules of evidence and procedure of the Court. If necessary, the accused must be provided with a translation of these documents.

(2) This article provides for the notification of the indictment to the accused in three different situations depending on whether the person is believed to be located in: (1) a State which is a party to the Statute and which has accepted the jurisdiction of the Court with respect to the alleged crime, (2) a State which is a party to the Statute but has not accepted the jurisdiction of the Court with respect to the alleged crime, or (3) a State which is not a party to the Statute.

(3) In the first instance, the Court shall order the State to personally notify the accused of the indictment, transmit the accompanying documents and comply with any arrest or detention order. Such a State has recognized the existence of the crime as a matter of law and has accepted these obligations as a party to the Statute.

(4) In the second instance, the Court shall request the State to cooperate in notifying, arresting or detaining the accused. As a State party, the State has a general obligation to cooperate with the Tribunal. However, it does not have specific obligations regarding persons charged with crimes with respect to which it has not accepted the jurisdiction of the Court. Furthermore, it may not be a party to the treaty defining the crime.

(5) In the third instance, the Court shall transmit the indictment and other relevant documents and invite the State to cooperate in notifying, arresting or detaining the accused. Although such a State has not accepted any obligations with respect to the Tribunal, it should be given an opportunity and encouraged to cooperate in the prosecution of persons alleged to have committed serious crimes affecting the international community as a whole. If the State is a party to the treaty defining the crime, it may be prepared to do so.

(6) In the event that personal notification is not achieved within sixty days of the indictment, the Court may prescribe an alternative method of informing the accused of the charges, a matter which may be dealt with in greater detail in the rules to be adopted by the Court.

Article 34

Designation of persons to assist in a prosecution

> 1. A State party may, at the request of the Prosecutor, designate persons to assist in a prosecution.
>
> 2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to the exercise of their functions under this article.

Commentary

(1) This article is intended to facilitate the initiation of an investigation and prosecution without delay upon receipt of a complaint by making qualified and experienced personnel available on request to the Prosecutor who will not have a permanent staff to call upon when the need arises, at least during the initial phase of the Tribunal as envisaged in this Statute. States Parties may, at the request of the Prosecutor, designate persons available to assist in the investigation or prosecution of a case, either a particular case or in general, under paragraph 1 of this article. There would be utility, in the Working Group's view, in the preparation by the Registrar of a list of persons capable of assisting in investigations or prosecutions. States could be invited to suggest names for inclusion in such a roster.

(2) To avoid the disruption of an investigation or prosecution which is in progress, States should be prepared to make persons available for the duration of the prosecution. Any such persons would serve under the direction of the

Prosecutor and would be prohibited from seeking or receiving instructions from their Government or any other source. A similar provision concerning the staff of the United Nations is found in Article 100 of the United Nations Charter.

(3) The provision is intended to assist the Prosecutor in appointing qualified staff pursuant to paragraph 5 of article 13. However, the Prosecutor is not limited to the persons designated by States Parties in making these appointments. The Prosecutor is given the authority to select the persons who possess the necessary qualifications and experience to carry out the tasks assigned to the Procuracy with a view to ensuring the competence and independence of the Procuracy.

Article 35

Pre-trial detention or release on bail

> 1. The Court shall decide whether an accused person who is brought before it shall continue to be held in detention or be released on bail.
>
> 2. If the Court decides to hold the accused in detention, the State on whose territory the seat of the Court is established shall make available to the Court an appropriate place of detention and, where necessary, the requisite guards.

Commentary

(1) Once the accused has been arrested and transferred to the Tribunal, the Court shall decide whether the accused should be detained or released on bail while awaiting trial.

(2) Given the serious nature of the crimes under this Statute, there is every reason to believe that it will be necessary to detain the accused. Thus, paragraph 2 of this article requires the State on whose territory the Tribunal is located to provide the necessary detention facilities and the requisite guards. The Working Group believed that the details concerning such matters, as well as other appropriate security arrangements which may be deemed necessary, should be addressed in the agreement to be concluded by the Tribunal and the State selected for the seat of the Tribunal.

PART 4: THE TRIAL

Article 36

Place of trial

1. Unless otherwise decided by the Court, the place of the trial will be the seat of the Tribunal.

2. By arrangement between the Court and the State concerned, the Court may exercise its jurisdiction in the territory of any State party, or in the territory of any other State.

3. Where practicable and consistent with the interest of justice, a trial should be conducted in or near the State where the alleged crime was committed.

Commentary

(1) The trials will generally take place at the seat of the Tribunal and make use of the available personnel and facilities. Alternatively, the Court may decide, in the light of the circumstances of a particular case, that it would be more practical to conduct the trial at a location which is situated closer to the scene of the alleged crime to facilitate the transportation of witnesses and evidence in a shorter period of time and at a lower cost.

(2) However, the proximity of the trial to the place where the type of crimes referred to in the Statute were allegedly committed may cast a political shadow over the judicial proceedings, thus raising questions concerning respect for the defendant's right to a fair and impartial trial, or may create unacceptable security risks for the defendant, the witnesses, the judges and the other staff of the Tribunal. Thus, trials may take place in a State other than the host country only when it is both practicable and consistent with the interest of justice to do so.

(3) The Chamber must take into account these two considerations in determining the place of the trial in accordance with paragraph 1 (a) of article 39. The Chamber may request the views of the Prosecutor or the defence on this question without unnecessarily delaying the commencement of the trial.

(4) Trials taking place in States other than the host country would be conducted pursuant to an arrangement between the Tribunal and the State concerned, which may or may not be a State party to the Statute. This arrangement would need to address matters similar to those to be provided for

in the agreement with the host country and possibly other matters if the trial is to be held in a State which is not a party to the Statute. It was suggested that the standard conditions for such an arrangement could be set forth in an annex to the Statute, with the possibility of adding any additional provisions that may be required in a particular case. The Working Group recognized that it may be more appropriate to move this provision to the article of the Statute that will provide for the headquarters agreement, an article to be added at a later stage.

Article 37

Establishment of Chambers

1. Cases shall be tried by Chambers of the Court.

2. A Chamber of the Court shall be established in accordance with the rules of the Court. Each Chamber shall consist of five judges.

3. Several Chambers may be established and may sit concurrently.

4. No judge from a complainant State or from a State of which an accused is a national shall be a member of the Chamber dealing with that particular case.

Commentary

(1) Persons charged with crimes under the Statute would be tried by a Chamber of the Court consisting of five judges to be established in accordance with the rules to be adopted by the Court.

(2) Depending on the number of cases referred to the Court, it may be necessary, to ensure respect for the right of the accused to be tried without undue delay, to convene more than one Chamber and conduct several trials concurrently.

(3) In the light of the nature of the crimes covered by the Statute, no judge may serve in a Chamber convened to hear a case on the basis of a complaint brought by the State of which the judge is a national or against an accused who is of the same nationality as the judge. This is to avoid any questions concerning the independence or impartiality of the Court and to ensure that the accused receives a fair trial.

(4) The Chamber is to be convened by the Bureau to hear a particular case upon the affirmation of an indictment in accordance with article 32. Some members believed that it would be appropriate for the Bureau, as the standing

body of the judicial organ consisting of the officers of the Court, to appoint the judges who would serve in a Chamber. However, other members believed that the membership of the Chambers should be predetermined on an annual basis and should follow the principle of rotation to ensure that all judges would have the opportunity to participate equally in the work of the Court. It was also suggested that the selection should be based on an objective criteria set forth in the rules to be adopted by the Court, rather than the subjective decision of the three members of the Bureau. The Working Group invited the Commission and the General Assembly to comment on this issue which would be considered at a later stage.

Article 38

Disputes as to jurisdiction

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it.

2. Challenges to its jurisdiction may be made, in accordance with procedures laid down by the rules:

(a) at the commencement of the trial, by an accused or any State party;

(b) at any stage of the trial, by the accused.

3. If a State challenges the jurisdiction of the Court under paragraph 2 (a), the accused has a full right to be heard in relation to the challenge. A decision that there is jurisdiction shall not be reopened at the trial.

Commentary

(1) The competence of the Court is limited to those cases which are within its jurisdiction as defined by the Statute. The Court must satisfy itself that it has jurisdiction to hear a particular case before proceeding to do so.

(2) Any State Party may challenge the jurisdiction of the Court with respect to a particular case in preliminary proceedings at the commencement of the trial. States Parties which may be called upon to assist in the prosecution of the case, from serving documents to providing evidence and surrendering the accused, should have the right to challenge the jurisdiction of the Court, not at any stage in the proceeding, but at least at the commencement of the trial. It would be unreasonable to allow a State Party duly notified of the

indictment to wait until the proceedings were almost completed to raise such an objection, particularly since the proceedings may be both lengthy and costly. The accused has the right to participate in the proceedings concerning the jurisdictional challenge raised by a State Party. Once the Court has decided that it has jurisdiction, that decision cannot be reopened at the trial.

(3) Some members felt that only States which have a direct interest in the case should be allowed to challenge the jurisdiction of the Court. However, other members felt that since the criminal jurisdiction was conferred on the Court by all of the States Parties, any one of them should have the right to question whether the Court was acting in accordance with this conferral of jurisdiction.

(4) The accused has the right to challenge the jurisdiction of the Court at any stage of the trial. This reflected the view that the accused should, as a matter of principle, have the right to challenge the jurisdiction of a court in a criminal proceeding at any stage of the proceeding. However, some members felt that the question of jurisdiction should be determined by the Court as a preliminary issue and, therefore, jurisdictional challenges should be raised by States Parties or the accused at the commencement of the trial.

(5) In addition, it was suggested that, given the very serious consequences of being charged with one of the crimes covered by the Statute, it would be imperative for the accused to be allowed to challenge the jurisdiction of the Court, and possibly the sufficiency of the indictment, at an earlier stage than the trial since a person's reputation would suffer greatly by merely being charged with one of the crimes referred to in the Statute. However, other members noted that the limited institutional structure of the Court did not provide for an existing judicial body to hear such challenges before the commencement of the trial. The Statute does allow a State Party ordered to arrest and surrender the accused to challenge the indictment on jurisdictional or other grounds in paragraph 7 of article 63. In the absence of a Chamber, such a challenge could be decided by the Bureau, although this may be the same body that initially issued the indictment.

(6) The Working Group decided to return to this matter at a later stage and invited comments on the following questions:

(a) Should all States Parties or only those with a direct interest in the case have the right to challenge the Court's jurisdiction?

(b) Should the Statute provide for the possibility of pre-trial challenges by the accused as to jurisdiction and/or the sufficiency of the indictment? If so, should such challenges be decided by the Bureau or should a Chamber be established at the pre-trial stage to decide such matters?

Article 39

Duty of the Chamber

1. If the Bureau has not already done so under article 32, the Chamber shall decide, as early as possible in each case:

(a) the place at which the trial is to be held, having regard to article 36;

(b) the language or languages to be used during the trial, having regard to article 18 and article 44, paragraphs 1 (f) and 2.

2. The Chamber may order:

(a) the disclosure to the defence of documentary or other evidence available to the Prosecutor, having regard to article 44, paragraph 3;

(b) the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial.

3. At the commencement of the trial, the Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, and allow the accused to enter a plea of guilty or not guilty.

Commentary

(1) Once the Chamber has been established it must decide certain preliminary matters and may issue various pre-trial orders at the request of either the prosecution or the defence. The Chamber determines the place of the trial in accordance with the provisions of article 36, unless the Bureau has already done so when it convened the Chamber in accordance with article 32.

(2) The Chamber must also decide on the languages to be used during the trial, bearing in mind the right of the accused to a simultaneous interpretation of the proceedings, if necessary, according to article 44, and the two working languages of the Tribunal, English and French, as provided in article 18.

(3) The Chamber may issue pre-trial orders to ensure the right of the accused to have adequate time and facilities for the preparation of the defence.

Prior to the commencement of the trial, the accused has the right to receive all incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution, according to paragraph 3 of article 44. The present article authorizes the Chamber to order the Prosecutor to provide such information.

(4) The Chamber may also issue orders requiring the defence and the prosecution to exchange information so that both parties are aware of the issues to be decided at the trial and adequately prepared to present their arguments on those issues at the commencement of the proceedings. This will ensure that the trial is conducted efficiently and without unnecessary delays.

(5) At the commencement of the trial, the presiding judge of the Chamber must read the indictment to make sure that the accused understands the charges. Before allowing the accused to enter a plea, the Court must also satisfy itself that the person has been informed of and understands the rights of the accused and that those rights have been fully respected.

Article 40

Fair trial

> 1. The Chamber shall ensure that a trial is fair and expeditious, conducted in accordance with the present Statute and the rules of procedure and evidence of the Court, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
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> 2. A trial shall be public, unless the Chamber determines that certain proceedings be in closed session, in accordance with article 46 of the Statute.

Commentary

This article establishes the responsibility of the Chamber, acting on behalf of the Court, to ensure that any person charged with crimes under this Statute receives a fair and expeditious trial which fully respects the rights of the accused set forth in articles 40 to 45. The Chamber must also conduct the proceedings in accordance with the uniform procedures and standards established in the rules of procedure and evidence to be adopted by the Court. The trial is to be conducted in public, unless the Chamber determines that it is necessary to close the proceedings to protect the accused, victims or witnesses in accordance with article 46. For example, this may be necessary to protect the privacy of victims or to avoid public disclosure of the identity of witnesses whose safety may be threatened. While the Court is required to have due regard for the protection of victims and witnesses, this must not interfere with full respect for the rights of the accused to a fair trial. Thus, while the Court may order the non-disclosure to the media or the general public of the identity of a victim or witness, the right of the accused to question the prosecution witnesses must be fully respected under paragraph 1 (d) of article 44.

Article 41

Principle of legality (nullum crimen sine lege)

An accused shall not be held guilty:

(a) in the case of a prosecution under article 22, unless the treaty concerned was in force [and its provisions had been made applicable in respect of the accused;]

(b) in the case of a prosecution under article 26 (2) (a), unless the act or omission in question constituted a crime under international law; or

(c) in the case of a prosecution under article 26 (2) (b), unless the act or omission constituted a crime under the relevant national law, in conformity with the treaty,

at the time the act or omission occurred.

Commentary

(1) The principle of nullum crimen sine lege is a fundamental principle of criminal law which is recognized in article 15 of the United Nations Covenant on Civil and Political Rights which states as follows: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed." 308/ Paragraph 2 of article 15 recognizes that such act or omission may be "criminal according to the general principles of law recognized by the community of nations." 309/

(2) In accordance with the proposed article, a person may be prosecuted for an act or omission which was defined as a crime at the time it occurred by any one of the following sources of law: (1) a treaty which was in force [and

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308/ United Nations, Treaty Series, vol. 999, No. 14668, p. 171 and vol. 1057, p. 407.

309/ Ibid.

applicable with respect to the accused]; (2) customary international law; or (3) national law enacted in conformity with the relevant treaty.

(3) With regard to crimes defined in a treaty, the language that appeared within brackets in subparagraph (a) reflected a difference of opinion as to whether, for the principle of legality to apply, the State Party must have fulfilled any obligation provided for in the treaty or required as a matter of internal law to either adopt implementing legislation or to define the crime as a matter of national law, respectively. Some members felt that the treaty did not directly create any obligations for the individual, while others believed that in the case of crimes under international law the prohibition and the criminal responsibility flowed directly from international law, emphasizing the source of the prohibition of the conduct and the criminalization of the offence. With respect to the latter point, it was suggested that there may be circumstances in which it would be possible to prosecute an individual for a crime under international law in an international tribunal even though the same person could not be tried in a national court due to the absence of the necessary provision in the national criminal code. One member felt that the rules of international criminal law should be applied uniformly rather than creating inequalities as to the criminal responsibility of different individuals based on requirements of internal law or the failure of a State Party to comply with its treaty obligations.

Article 42

Equality before the Tribunal

All persons shall enjoy equality before the Tribunal.

Commentary

This provision is consistent with article 14 of the United Nations Covenant on Civil and Political Rights which states that "All persons shall be equal before the courts and tribunals." 310/ The term "persons", as it is used in this provision, is intended to cover various categories of persons, including not only accused persons, but also victims and witnesses, who may come before the Court to be tried or to testify in a proceeding and should be treated equally.

310/ Ibid.

Article 43

Presumption of innocence

A person shall be presumed innocent until proved guilty.

Commentary

This provision recognizes that in a criminal proceeding the accused is entitled to a presumption of innocence and the burden of proof rests with the prosecution. The presumption of innocence is recognized in article 14 of the United Nations Covenant on Civil and Political Rights which states that "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." 311/ The Prosecutor has the burden to prove every element of the crime beyond a reasonable doubt or in accordance with the standard for determining the guilt or innocence of the accused. If the Prosecutor fails to prove that the accused committed the alleged crime, then the person must be found not guilty of the charges contained in the indictment.

Article 44

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 40, paragraph 2, and to the following minimum guarantees:

(a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;

(b) to be informed of the right of the accused to conduct the defence or to have the assistance of counsel of the accused's choice or, in the absence of means to retain counsel, to have counsel and legal assistance assigned to the accused by the Court;

(c) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel;

(d) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

(e) to be tried without undue delay;

(f) if any of the proceedings of, or documents presented to, the Court, are not in a language the accused understands and speaks, to have,

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311/ Ibid.

free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt;

(h) to be present at the trial, unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.

2. At the commencement of a trial, the Court shall ensure that the indictment and other documents referred to in article 33, paragraphs 1 (b) and 4 (b) of the Statute, and copies thereof in a language understood and spoken by the accused, have been provided to the accused sufficiently in advance of the trial to enable adequate preparation of the defence.

3. All incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution prior to the commencement of the trial shall be made available to the defence as soon as possible and in reasonable time to prepare for the defence.

Commentary

(1) This article sets forth in paragraph 1 the minimum guarantees to which the accused is entitled in the determination of the criminal charges. It reflects the fundamental rights of the accused set forth in article 14 of the United Nations Covenant on Civil and Political Rights.

(2) In connection with paragraph 1 (h), the question of the possibility of holding trials *in absentia* gave rise to conflicting views in the Working Group. According to some members, this possibility was completely unacceptable from the perspective of a fair trial which respects the fundamental rights of the accused. Attention was drawn to article 14 of the United Nations Covenant on Civil and Political Rights which characterizes the right of the accused to be present at the trial as a minimum guarantee to which everyone shall be entitled, in full equality, in the determination of any criminal charge. Furthermore, they felt that judgements by the Court without the actual possibility of implementing them might lead to a progressive loss of its authority and effectiveness in the eyes of public opinion.

(3) Other members were strongly in favour of drawing some distinctions, as regards, in particular, three possible situations: (a) the accused has been indicted but is totally unaware of the proceedings; (b) the accused has been duly notified but chooses not to appear before the Court; and (c) the accused has already been arrested but escapes before the trial is completed. Most of

those members thought that while in hypothesis (a), an accused person should not be judged in absentia, in cases (b) and (c) a trial in absentia is perfectly in order, otherwise, the Court's jurisdiction would, in fact, be subject to the "veto" of the accused. Furthermore, they felt that in such cases a judgement in absentia would in itself constitute a kind of moral sanction which could contribute to the isolation of the accused wherever located and, possibly, to eventual capture. It was also argued in favour of trials in absentia that in criminal cases evidence should be effectively preserved by means of an expeditious trial. Such evidence might be lost if proceedings were delayed until such time as the accused could be brought before the Court. One member felt that trials in absentia could be appropriate under (c) above but not under (a) or (b). Another member also mentioned disruption of the trial by the accused, security reasons, or ill health of the accused, as valid grounds for pursuing the trial without the presence of the accused.

(4) Members in favour of trials in absentia also generally felt that such a judgement should be provisional in the sense that if the accused appeared before the Court at a later stage, then a new trial should be conducted in the presence of the accused.

(5) One member felt that if the Commission decided to allow trials in absentia, then this matter would need to be regulated in greater detail in the Statute.

(6) The Working Group invited the Commission and the General Assembly to comment on the question of trials in absentia.

(7) As in other provisions of this Statute, paragraph 2 of this article recognizes the responsibility of the Court, or a Chamber acting on behalf of the Court, to ensure respect for the rights of the accused, including the right to have adequate time and facilities for the preparation of the defence in accordance with paragraph 1 (c). At the commencement of the trial, the Court must ensure that the indictment and the other documents referred to in article 33 have been provided to the accused sufficiently in advance of the trial.

(8) The accused is also entitled to receive all incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution in reasonable time to prepare for the defence, according to paragraph 3 of this article. Whereas the prosecution is required to provide

the accused with all exculpatory evidence to give effect to the right to prepare and present a defence, the prosecution is not required to provide incriminating evidence which may be privileged or may jeopardize the safety of victims or witnesses if it is not going to be used by the prosecution during the trial.

Article 45

Double jeopardy (non bis in idem)

1. No person shall be tried before any other court for acts constituting crimes referred to in articles 22 or 26, for which that person has already been tried under this Statute.

2. A person who has been tried by another court for acts constituting crimes referred to in articles 22 or 26 may be subsequently tried under this Statute only if:

(a) the act in question was characterized as an ordinary crime; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which any sentence imposed by another court on the same person for the same act has been served.

Commentary

(1) The principle of non bis in idem, sometimes referred to as the prohibition against double jeopardy, is a fundamental principle of criminal law. This principle is recognized in paragraph 7 of article 14 of the United Nations Covenant on Civil and Political Rights which states that "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." 312/

(2) The present provision recognizes this principle with respect to the Court. It is also inspired by article 10 of the Statute of the International Tribunal created by the Security Council for crimes committed in the former

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312/ Ibid.

Yugoslavia, 313/ with minor modifications to take account of the possibility of a previous trial in another international court or tribunal.

(3) The prohibition on subsequent trials under paragraph 1 applies only where the Court has actually exercised jurisdiction and made a determination on the merits with respect to the particular acts constituting the crime. Since the jurisdiction of national courts would not be affected unless the Court had actually exercised jurisdiction with respect to the merits, it was not considered necessary to include a provision equivalent to article 9 of the Statute adopted by the Security Council with respect to the question of concurrent jurisdiction.

(4) The phrase "characterized as an ordinary crime" in paragraph 2 (a) refers to the situation where the act has been treated as a common crime as distinct from an international crime having the special characteristics of the crimes referred to in article 22 or 26 of this Statute. For example, the same act may qualify as the crime of aggravated assault under national law and torture or inhuman treatment under article 147 of the Fourth Geneva Convention of 1949. 314/

(5) Paragraph 2 (b) of this article reflected the view that the Tribunal should be able to prosecute a person for acts constituting crimes referred to in this Statute if the previous criminal proceeding against the same person for the same acts was really a "sham" proceeding, possibly even designed to shield the person from being tried by the Court. In this connection, one member suggested that the need for this provision was demonstrated by some of the war crimes trials in national courts after the First and Second World Wars. However, other members expressed strong reservations about allowing the Court to review the trial proceedings of national courts as an unacceptable encroachment on State sovereignty.

(6) In the event that the Court convicts a person under either of the situations contemplated in paragraph 2, it must take into consideration in the determination of the appropriate penalty under articles 52 to 54 the extent to which the person has actually served a sentence imposed by another court for the same acts. While a person may be convicted of more than one crime based

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313/ Document S/25704

314/ Convention relative to the Protection of Civilian Persons in Time of War, United Nations, *Treaty Series*, vol. 75, No. 973.

on the same acts, for example murder and war crimes, the person should not be subject to multiple sentences for the same acts without any regard for the extent to which a previous sentence has already been served.

Article 46

Protection of the accused, victims and witnesses

> The Chamber shall take all necessary measures available to it, to protect the accused, victims and witnesses, and may to that end conduct proceedings in camera or allow the presentation of evidence by electronic or other special means.

Commentary

(1) The Chamber, acting on behalf of the Court, has the responsibility and the authority to take the necessary steps to protect the accused, as well as victims and witnesses participating in the proceedings. The non-exhaustive list of such measures provided in this article include ordering that the trial shall be conducted in closed proceedings or allowing the presentation of evidence by electronic means such as video cameras.

(2) In conducting the proceedings, the Court must have due regard for the need to protect both victims and witnesses but only to the extent that this is consistent with full respect for the rights of the accused, in accordance with article 40. For example, allowing a key prosecution witness to testify by video camera may raise questions concerning the right of the defendant to examine prosecution witnesses and the ability of the judges to assess the credibility of witnesses, which is often critical in criminal proceedings, if they are not present in the courtroom. At the same time, such procedures may be the only way to obtain the testimony of a particularly vulnerable victim or witness.

Article 47

Powers of the Court

> 1. The Court shall, subject to the provisions of the Statute and in accordance with the rules of procedure and evidence of the Court have, *inter alia*, the power to:
>
> (a) require the attendance and testimony of witnesses;
>
> (b) require the production of documentary and other evidentiary materials;

(c) rule on the admissibility or relevance of issues, evidence and statements;

(d) maintain order in the course of a trial.

2. The Court shall ensure that a complete record of a trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar under the authority of the Court.

Commentary

(1) This article sets forth in paragraph 1 the general powers of the Court in conducting the proceedings, including ordering the attendance and testimony of witnesses, the production of documentary or other evidence, determining the relevance or admissibility of evidence, and maintaining order in the courtroom.

(2) There must be a complete and accurate record of the trial proceedings which is to be maintained and preserved by the Registrar under the authority of the Court. This record of the trial would be of particular importance to the defendant, as well as the Prosecutor, in the event of a conviction which is subject to appeal or revision under articles 55 or 57, respectively.

Article 48

Evidence

1. The Court shall, on the application of the prosecution or of the defence, require any person to give evidence at the trial unless it concludes that the evidence of such person would not contribute to clarifying any matter of relevance to the trial. The Court may also on its own initiative require any person to give evidence at the trial.

2. Before testifying, each witness shall make such oath or declaration as is customary in judicial proceedings in the State of which the witness is a national.

3. The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its admissibility or relevance. Any such ruling shall be made in open court.

4. The Court shall not require proof of facts of common knowledge but may take judicial notice thereof.

5. Evidence obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights shall not be admissible.

6. A witness who has not yet testified shall not be present when the evidence of another witness is taken. However, a witness who has heard the evidence of another witness shall not for that reason alone be disqualified from giving evidence.

7. The Court may accept evidence in such forms as it deems appropriate in accordance with its rules of procedure and evidence.

Commentary

(1) While some members felt that the rules of evidence were too complex to be addressed in the Statute, other members felt that it should include some basic provisions on this important subject. The Nuremberg Tribunal, which was not bound by technical rules of evidence, was required to admit any evidence which had probative value, according to article 19 of its Charter.

(2) The Court, acting on the recommendation of the Bureau, would establish its own rules of evidence and procedure pursuant to article 19 of the present Statute. It may accept evidence in such forms as it deems appropriate in accordance with those rules, under paragraph 7 of this article. The Court may also take judicial notice of facts which are common knowledge rather than requiring proof of such facts, according to paragraph 4 which is similar to article 21 of the Nuremberg Charter. 315/

(3) The Court shall require a person to give evidence or testify at the trial, at the request of the prosecution or the defence or on its own initiative, unless the Court concludes that such evidence or testimony would be of no probative value in determining any question which is at issue in a particular case, according to paragraph 1 of this article. To ensure the veracity of testimony, witnesses would be required to take the oath or make the declaration normally required in their national courts pursuant to paragraph 2. For the same reason, a witness who had not yet testified should not be present when other witnesses were testifying during the trial, according to paragraph 6. However, a witness who heard the testimony of other witnesses before testifying would not be disqualified unless the Court determined that this was necessary because of the possibility that the testimony would be tainted.

(4) The Working Group noted that the Statute did not include a provision making it a crime to give false testimony before the Court. Thus, the obligation to tell the truth embodied in the oath or declaration required

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315/ United Nations, Treaty Series, vol. 82, No. 251.

before a witness may testify was not accompanied by the threat of punishment under this Statute. There were some doubts as to whether it would be appropriate to address this matter in the Statute, rather than requesting States parties and other States which accepted the jurisdiction of the Court to address this matter by extending their national criminal laws concerning perjury or false testimony to cover violations of the relevant national oath or declaration by their nationals before the Court. The Working Group decided to return to this question.

(5) The prosecution or defence may be required to inform the Court of the nature and purpose of evidence proposed for introduction in the trial to enable it to make a prior determination of relevance or admissibility, according to paragraph 3, which is similar to article 20 of the Nuremberg Charter. 316/ This requirement is particularly important in criminal trials before a jury to avoid the introduction of inadmissible evidence which may be prejudicial to the defendant and subsequently difficult for lay persons to ignore notwithstanding judicial instructions to the contrary. However, it is also an important requirement in other criminal trials to enable a court to fulfil its responsibility for ensuring an expeditious trial limited in scope to a determination of the validity of the charges against the accused and issues relating thereto. Some members also stressed the desirability of this provision to prevent the collection or production of evidence from being used as a delaying tactic during the trial, as well as the substantial costs which may be involved in translating inadmissible evidence. Other members felt strongly that this provision should not be interpreted as allowing the Court to exclude evidence in ex parte or closed proceedings, rather than following the normal procedure in which motions for the introduction of evidence were made by counsel, in the presence of opposing counsel, and decided by the Court in public proceedings. It was suggested that the Court's rulings as to the admissibility of evidence should be subject to appeal. The Working Group decided to return to the question of providing for interlocutory appeals at a later stage. This would also require consideration of the appropriate body to decide such matters, for example the Bureau or an Appeals Chamber, bearing in mind the nature of the Tribunal.

316/ Ibid.

(6) The Court must exclude any evidence obtained either directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights, according to paragraph 5. With regard to the standard for applying the exclusionary rule, one member suggested that only evidence obtained in violation of a peremptory norm of human rights should be inadmissible. However, other members felt that the Court should have discretion to exclude any evidence obtained in violation of international law. The Working Group decided to return to this question.

Article 49

Hearings

1. The indictment shall be read to the accused and the Court shall ask the accused to plead guilty or not guilty to each of the charges in the indictment.

2. If an objection is raised as to the jurisdiction of the Court, the Court shall rule on the objection prior to proceeding any further with the trial.

3. The Prosecutor shall make an opening statement and call witnesses and present evidence on behalf of the prosecution and, thereafter, the defence may make an opening statement and may call witnesses and present evidence on behalf of the accused.

4. When hearings of evidence have been completed, the prosecution shall make its closing statement and, thereafter, the defence may make its closing statement.

5. The Court shall ask whether the accused wishes to make a statement before it delivers the judgement, and shall, if the accused so wishes, permit such a statement to be made.

6. The Court shall, thereafter, retire for closed and private deliberations upon the judgement it is to make.

Commentary

(1) The trials conducted by a Chamber of the Court would follow the general procedure set forth in this article, which is similar to a somewhat more detailed provision contained in article 24 of the Nuremberg Charter. 317/ The Court would first read the indictment and request the defendant to enter a plea of guilty or not guilty with respect to each of the crimes alleged in the indictment. Any jurisdictional challenges raised in accordance with

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317/ Ibid.

article 38 must be decided before continuing with the trial. The Prosecutor would first present the case for the prosecution which would be followed by the case for the defence. At the conclusion of the hearing, the prosecution would be required to make a closing statement demonstrating that the burden of proof had been met. The defence would be entitled to make a closing statement and thus have the "last word", but would not be required to do so since the accused is entitled to a presumption of innocence. One member suggested that the Court may decide that the prosecution has not met its burden thus obviating the need for the defence to make any statement. At the conclusion of the hearing, the Court shall engage in private deliberations to ensure a full and candid exchange of views resulting in its decision in the case.

(2) The rules to be adopted by the Court would contain more detailed provisions concerning the procedures to be followed throughout the trial to ensure that the proceedings are conducted in accordance with uniform rules and procedures.

Article 50

Quorum and majority for decisions

At least four judges must be present at each stage of the trial. The decisions of the Chambers shall be taken by a majority of the judges.

Commentary

This article provides the general rules concerning the necessary quorum to conduct the trial proceedings and the extent of agreement required for taking decisions. The rules to be adopted by the Court would address such matters in greater detail. However, the Working Group felt that it would be useful to include these provisions in the Statute to establish the general guidelines for the functioning of the Court.

Article 51

Judgement

1. The Court shall pronounce judgements and impose sentences on persons convicted of crimes under this Statute.

2. The judgement of the Court shall be in written form and contain a full and reasoned statement of its findings and conclusions. It shall be the sole judgement or opinion issued.

3. The judgement shall be delivered in open Court.

Commentary

(1) This article confers on the Court the power to pronounce judgements of acquittal or conviction, depending on its determination of the merits of the charges against the accused based on the evidence presented during the trial, and to impose sentences in cases resulting in convictions, in accordance with articles 52 to 54, 66 and 67, paragraph 4 of this Statute. It is at this point in time that the person who was initially suspected of committing a crime, and therefore the subject of an investigation (the suspect), and later accused of committing the crime when the indictment was affirmed (the accused), now becomes the convicted person when the Court decides that the prosecution has met its burden of proving the charges contained in the indictment and pronounces the judgement that the person is guilty as charged.

(2) The term "sentence" was used to refer to the punishment imposed by the Court against a convicted person in a particular case. It was considered broad enough to encompass the full range of penalties at the disposal of the Court, including imprisonment, fines and the confiscation of unlawfully acquired property.

(3) The judgement must be in writing and be accompanied by a full and reasoned statement of the findings of fact and conclusions of law on which it is based. The Court would issue a single judgement reflecting the opinion of the majority of judges. There would be no dissenting or separate opinions. The judgment would be delivered in a public proceeding.

(4) In connection with paragraph 2, different views were expressed on the desirability of allowing separate or dissenting opinions. The well known dissenting opinion to the Judgement of the Nuremberg Tribunal was issued notwithstanding the silence of the Charter on this question. Those who were opposed to allowing such opinions felt that they would undermine the authority of the Court and its judgements. Some members suggested that judges may hesitate to issue such opinions as a result of concerns for their personal safety given the serious nature of the crimes referred to in the Statute. However, other members believed that judges should have the right to issue separate or dissenting opinions as a matter of conscience, if they chose to do so. It was also suggested that these opinions would be extremely important to the defendant who chose to appeal a conviction and may also be of interest to the Appeals Chamber in deciding whether to overturn the conviction. The

Working Group, however, felt that the reasons militating against authorizing dissenting or separate opinions outweighed the possible positive effects of such opinions.

Article 52

Sentencing

> 1. The Court shall hold a further and separate hearing to consider the question of the appropriate sentences to be imposed on the convicted person and to hear the submissions of the prosecution and of the defence and such evidence as the Court may deem to be of relevance.
>
> 2. The Court shall retire for deliberations in private.
>
> 3. The decisions of the Court on the sentences shall be delivered in open court.

Commentary

(1) The sentencing process is the first phase of the post-trial procedures. It is generally considered to represent a separate process which is distinct from the trial. Whereas the purpose of the trial is to determine the truth of the charges against the accused, the purpose of the sentencing hearing is to determine an appropriate punishment in relation to the individual as well as the crime.

(2) This distinction is reflected in the rights of the accused which are often couched in terms of the trial. Many of the fundamental procedural guarantees inherent in a fair trial, notably the right to counsel, also extend to the sentencing hearing. However, other rights of the accused may not be as extensive at that stage of the proceeding, for example the right to cross-examine witnesses. Also, a court may consider evidence at the sentencing hearing, for example out-of-court statements, which may not be admissible during the trial.

(3) The Working Group felt that these considerations merited a further and separate sentencing hearing, while leaving the details of such proceedings to the rules to be adopted by the Court.

(4) At the conclusion of the sentencing hearing, the Court is required to consider the matter in private deliberations to ensure a full and candid exchange of views. This is similar to the requirement contained in paragraph 6 of article 49 concerning the deliberations following the conclusion of the trial.

(5) The Court must impose sentences on convicted persons, in accordance with paragraph 1 of article 51. In performing this responsibility, it would be necessary for the Court to determine (1) the appropriate penalty or form of punishment to be imposed and (2) the degree of punishment commensurate with the crime in accordance with the general principle of proportionality.

(6) As regards the first question, the Court must consider the applicable penalties which the Court is authorized, in general, to impose with respect to the crimes referred to in the Statute and determine the appropriate form of punishment to be imposed in a particular case. For example, the Court may impose imprisonment or a fine but not the death penalty in accordance with article 53.

(7) In terms of the second question, the Court must determine the appropriate degree or severity of punishment to be imposed for the particular crime committed by the convicted person, having regard to both the crime and the individual, such as the length of imprisonment or the amount of the fine. The obligation of the Court to consider any relevant aggravating or mitigating circumstances in determining the appropriate punishment is dealt with in article 54.

(8) The Court must announce its decision as to the appropriate punishment to be imposed on the convicted person in the form of a sentence, accompanying its judgement in the case, which must be announced in a public proceeding. The decisions of the Court regarding sentences are subject to appeal on the ground that there is a "manifest disproportion between the crime and the sentence", in accordance with article 55.

Article 53

Applicable penalties

1. The Chamber may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of imprisonment, up to and including life imprisonment;

(b) a fine of any amount.

2. In determining the length of a term of imprisonment or the amount of a fine to be imposed for a crime, the Chamber may have regard to the penalties provided for by the law of:

(a) the State of which the perpetrator of the crime is a national;

(b) the State on whose territory the crime was committed; or

(c) the State which had custody of and jurisdiction over the accused.

3. The Chamber may also order:

(a) the return to their rightful owners of any property or proceeds which were acquired by the convicted person in the course of committing the crime;

(b) the forfeiture of such property or proceeds, if the rightful owners cannot be traced.

4. Fines paid or proceeds of property confiscated pursuant to this article may be paid or transferred, by order of the Chamber, to one or more of the following:

(a) the Registrar, to defray the costs of the trial;

(b) a State whose nationals were the victims of the crime;

(c) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.

Commentary

(1) This article sets forth the applicable penalties which would be available to the Court in determining the appropriate punishment in a particular case, including a term of imprisonment up to and including life imprisonment and a fine of any amount. The Court would not be authorized to impose the death penalty.

(2) Whereas the term "sentence" connotes a term of imprisonment and the punishment imposed in a particular case, the term "penalty" is used as the generic term to encompass the various types of punishment which the Court may impose, including a fine or confiscation of property as well as imprisonment. For example, the national courts of some States are authorized, in general, to impose the death penalty in accordance with national law. The national courts may decide to apply such a penalty to a particular case by imposing the death sentence on the convicted person.

(3) In determining the term of imprisonment or the amount of fine to be imposed, the Court may consider the relevant provisions of the national law of the States which have a particular connection to the person or the crime

committed, namely the State of which the convicted person is a national, the State on whose territory the crime was committed or the State which had custody of and jurisdiction over the accused. Although any State may prosecute a person for a crime under international law in accordance with the principle of universal jurisdiction, providing that the Court may consider the relevant national law of these three States is based on the particular connection between them and either the individual or the crime. The consideration of the laws of these States is even more appropriate with respect to the crimes under national law referred to in paragraph 2 (b) of article 26 of this Statute. While the Court is free to consider the relevant national law of the States indicated in this article, it is not obliged to follow the law of any one of them.

(4) In addition to imprisonment or fines, the Court may also order the confiscation of property unlawfully obtained or the proceeds of unlawful conduct. The Court may further order the return of such property to its rightful owner and the payment of fines or illicit proceeds to the Registrar to defray the costs of the trial, to the State whose nationals were the victims of the crime for purposes of compensation, or to a fund to be established by the Secretary-General of the United Nations to benefit victims of crime. In this connection, attention may be drawn to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which contains detailed provisions concerning the confiscation of illicit proceeds, and the Optional Protocol to the Model Treaty on Mutual Assistance in Criminal Matters concerning the proceeds of crime.

(5) Some members questioned the ability of the Court to determine the ownership of stolen property in the absence of a claim filed by the alleged owner, which may need to be considered in a separate proceeding. Others felt that it was not appropriate to authorize the Court to order the return of stolen property, a remedy which they considered to be more appropriate in a civil rather than a criminal case. One member suggested that allowing the Court to consider such matters would be inconsistent with its primary function and contrary to its fundamental purpose, namely to prosecute and punish without delay perpetrators of the crimes referred to in the Statute. However, other members felt that the Court should have the additional authority to provide reparation to the victims of the crimes referred to in the Statute.

Article 54

Aggravating or mitigating factors

In imposing sentence, the Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

Commentary

(1) In determining the punishment to be imposed on the convicted person in the form of a sentence in a particular case, the Court must take into account all of the elements relating to the gravity of the crime committed, on the one hand, and the individual circumstances of the convicted person which may constitute mitigating factors, on the other. For example, the Court may decide to impose a lesser sentence for a war crime committed by a very young inexperienced member of the armed forces in comparison to the sentence imposed for the same crime committed by a senior military officer with years of training and experience. In this connection, some members suggested that the gravity of the crime could also constitute a mitigating factor in a particular case because some crimes were less serious than others.

(2) The Court must also take into account the extent to which any sentence imposed by another court on the same person for the same acts has already been served, in accordance with paragraph 3 of article 45.

PART 5. APPEAL AND REVIEW

Article 55

Appeal against judgement or sentence

1. [The Prosecutor and] the convicted person may, in accordance with the rules, appeal against a decision under articles 51, 52 or 53 on any of the following grounds:

   (a) material error of law;

   (b) error of fact which may occasion a miscarriage of justice; or

   (c) manifest disproportion between the crime and the sentence.

2. Unless the Chamber otherwise orders, a convicted person shall remain in custody pending an appeal, and provisional measures may be taken to ensure that the judgement of the Chamber, if affirmed, can be promptly enforced.

Commentary

(1) The Nuremberg Charter provided that the decisions of the Tribunal were final and not subject to review, in accordance with article 26 thereof. However, the Working Group felt that more recent developments militated in favour of providing for the right of appeal. The United Nations Covenant on Civil and Political Rights in paragraph 5 of article 14 states as follows: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." 318/ Furthermore, this right is provided for in article 25 of the Statute of the International Tribunal for the former Yugoslavia. 319/

(2) The convicted person may appeal: (1) the judgement, on the grounds that it is based on a material error of law or an error of fact which may occasion a miscarriage of justice; or (2) a sentence, on the grounds that the sentence is manifestly disproportionate to the crime. The notion of material error of law would include errors both of substantive law and of criminal procedure, and in both cases the error would have to be of such gravity as to invalidate the judgement.

(3) Consideration was also given to allowing the Prosecutor to appeal a decision on the same grounds. Members supporting this position invoked similar solutions in some systems of national law as well as the fact that the Prosecutor represented the interests of society as a whole. Some members, however, expressed concern about allowing the Prosecutor to appeal a decision of the Court, notably an acquittal, except in very limited circumstances and possibly at an earlier stage of the proceedings when the Court might decide to dismiss the case based on insufficient evidence before reaching a judgement on the merits. This is why the words "The Prosecutor and" appear between brackets in the text. One member believed that in such cases the Appeals Chamber should either deny the appeal or remand the case to a Chamber for further action, to the extent that such action would be consistent with the principle non bis in idem. The Working Group, noting that the extent to which the prosecution could bring an appeal varied in different legal systems,

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318/ United Nations, Treaty Series, vol. 999, No. 14668, p. 171 and vol. 1057, p. 407.

319/ Document S/25704.

decided to return to the question of distinguishing between the right of the defence and the right of the prosecution to appeal a decision of the Court, with a possible view to limiting the latter.

(4) A person who has been convicted of a crime must remain in custody while the appeal is pending, unless the Chamber decides otherwise. Provisional measures may be taken while the appeal is being considered to facilitate the prompt enforcement of the judgement and sentence of the Chamber in the event that the decision of the Appeals Chamber is affirmative. The Working Group decided to return to the question of time limits for filing an appeal.

Article 56

Proceedings on appeal

1. As soon as notice of appeal has been filed, the Bureau shall take steps in accordance with the rules to constitute an Appeals Chamber consisting of seven judges who did not take part in the judgement contested.

2. The President or a Vice-President shall preside over an Appeals Chamber.

3. The Appeals Chamber has all the powers of the Chamber, and may affirm, reverse or amend the decision which is the subject of the appeal.

4. The decisions of the Appeals Chamber shall be by majority, and shall be given in open court. Six judges shall constitute a quorum.

5. Subject to article 57, decisions of the Appeals Chamber shall be final.

Commentary

(1) The Bureau must establish an Appeals Chamber consisting of seven judges who did not participate in the consideration of the case by the Chamber, in accordance with the rules of the Court, as soon as the notice of appeal has been filed with the Registrar. One member was opposed to conferring the power of appointment on the members of the Bureau for the same reasons expressed with respect to article 37.

(2) The Appeals Chamber, as the higher chamber, would have all the powers of the Chamber, as provided in this Statute, and would also have the power to affirm, reverse or revise the decision of the lower court.

(3) The Appeals Chamber would decide the issues raised in the appeal based on the opinion of a majority of the judges. The decisions would be delivered at a public proceeding and would be final, subject to the possibility of revision under article 57.

(4) The Statute does not expressly provide for dissenting or separate opinions to the decisions of the Appeals Chamber. While some members felt that dissenting or separate opinions should not be allowed for the reasons expressed in connection with article 51, other members considered such opinions essential with respect to appellate decisions which deal with important questions of substantive and procedural law. The Working Group agreed to return to this matter.

(5) Some members believed that there should be a separate and distinct Appeals Chamber, such as the one provided for in article 11 of the Statute of the International Tribunal for the former Yugoslavia. 320/ This would be consistent with the principle of the double degree of jurisdiction under which judges of the same rank did not review each others' decisions to avoid undermining the integrity of the appeals process as a result of the judges' hesitancy to reverse decisions to avoid the future reversal of their own decisions. However, others were of the opinion that the limited structure of the Tribunal may not be conducive to reserving a number of judges to sit in an appeals chamber since that would severely limit the number of judges available for the trial chambers. Another alternative would be to have appeals heard by all of the judges of the Court meeting in plenary, except those who participated in the lower court decision. While some members felt that the appellate jurisdiction must as a matter of principle be exercised by a separate and distinct higher court, others felt that it would be sufficient to establish a higher chamber within the hierarchy of the Tribunal which would be the highest jurisdiction with competence in international criminal law comprised of the world's most eminent jurists.

(6) The Working Group invited the Commission and the General Assembly to comment on the questions raised in connection with article 56.

320/ Ibid.

Article 57

Revision

The convicted person [or the Prosecutor] may, in accordance with the rules of the Court, apply to the Court for revision of its judgement on the ground that a new fact, not known at the time of the trial or at the time of the appeal, which could have been a decisive factor in the judgement of the Court, has since then been discovered.

Commentary

(1) A person convicted of a crime may, in accordance with the rules to be adopted by the Court, apply for revision of a judgement on the ground that a new fact, which was not known at the time of the trial or appeal and which could have been a decisive factor in the judgement, has since been discovered. The Working Group considered that while appeals should be heard by a different chamber, revisions should be heard by the same chamber that issued the earlier decision. It was felt that such a chamber would be in the best position to determine whether the decision should be revised in the light of the newly discovered fact.

(2) The words "or the Prosecutor" appear between brackets for reasons similar to those expressed in connection with the bracketed language in article 55. The Working Group decided to return to the question of the role of the prosecution in appeal and revision proceedings, bearing in mind the fact that different as well as similar considerations may be relevant with respect to the two types of post-trial proceedings.

PART 6. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 58

International cooperation and judicial assistance

1. States parties shall cooperate with the Tribunal in connection with criminal investigations relating to, and proceedings brought in respect of, crimes within the Court's jurisdiction.

2. States parties which have accepted the jurisdiction of the Court with respect to a particular crime shall respond without undue delay to any request for international judicial assistance or an order issued by the Court with respect to that crime, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender of the accused to the Tribunal, in accordance with article 63.

(f) any other request that may facilitate the administration of justice, including provisions on interim measures as required.

Commentary

(1) The effective functioning of the Tribunal would be dependent upon the international cooperation and judicial assistance of States. States parties to the Statute would have an obligation to cooperate with criminal investigations conducted by the Prosecutor and to respond without undue delay to any request or order of the Court regarding, for example, the location of persons, the taking of testimony, the production of evidence, the service of documents, the arrest or detention of persons, or the surrender of the accused.

(2) This article is similar to article 29 of the Statute of the International Tribunal for the former Yugoslavia. 321/ Whereas all States would have an obligation to cooperate with the International Tribunal established by the Security Council under Chapter VII of the United Nations Charter, paragraph 1 of the present article recognizes the general obligation of all States parties to the Statute to cooperate with and provide judicial assistance to the Tribunal. States parties which have also accepted the jurisdiction of the Court with respect to the particular crime would be required to respond without undue delay to a request or order issued by the Court with respect to measures such as those listed in paragraph 2. In connection with this article, the Working Group also took account of the Model Treaty on Mutual Assistance in Criminal Matters adopted by the General Assembly in resolution 45/117 on 14 December 1990.

321/ Ibid.

Article 59

Cooperation with States non-parties to the Statute

> States non-parties to the present Statute may provide the Tribunal with judicial assistance and cooperation under articles 58 (2) or 62 on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.

Commentary

This article recognizes that all States as members of the international community have an interest in the prosecution, punishment and deterrence of the crimes referred to in the Statute. Thus, even those States which are not parties to the Statute are encouraged to cooperate with and to provide assistance to the Tribunal on the basis of comity, a unilateral declaration which may be general or specific in character, an ad hoc arrangement for a particular case or any other type of agreement between the State and the Tribunal.

Article 60

Consultation

> The States parties shall consult promptly, at the request of any one of them, concerning the application or the carrying out of the provisions on international cooperation and judicial assistance, either generally or in relation to a particular case.

Commentary

States parties are required to consult promptly at the request of any one of them concerning the application or implementation of the provisions on international cooperation and judicial assistance, either with respect to a particular case or a general matter concerning the Tribunal. This is intended to avoid undue delays in the functioning of the Tribunal which may require the cooperation of a number of States to effectively perform its functions either in a particular case or in general.

Article 61

Communications and contents of documentation

> 1. Communications in relation to this Statute shall normally be in writing and shall be between the competent national authority and the Registrar of the Court.

2. Whenever appropriate, communications may also be made through the International Criminal Police Organization (ICPO/INTERPOL), in conformity with arrangements which the Tribunal may make with this organization.

3. Documentation pertaining to international cooperation and judicial assistance shall include the following:

(a) the purpose of the request and a brief description of the assistance sought, including the basis and legal reasons for the request;

(b) information concerning the individual who is the subject of the request;

(c) information concerning the evidence sought to be seized, describing it with sufficient detail to identify it, and describing the reasons for the request and the justification relied upon;

(d) description of the basic facts underlying the request; and

(e) information concerning the charges, accusations or conviction of the person who is the subject of the request.

4. All communications and requests shall be made in one of the working languages set forth in article 18 of the present Statute.

5. If the requested State considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional information.

Commentary

(1) This article establishes the general rule that communications should normally be between the Registrar and the competent national authorities of the State concerned and should be in writing in one of the working languages of the Tribunal, namely English or French, as provided in article 18.

(2) It also recognizes the possibility of communications between the Tribunal and the International Criminal Police Organization, which may be particularly appropriate in connection with criminal investigations.

(3) Any request or order must be accompanied by a sufficient explanation of its purpose and legal basis as well as appropriate documentation, in accordance with paragraph 3 of this article. Upon receipt of such a communication, the State may ask the Tribunal to provide additional information required to respond to the request or comply with the order.

(4) This article is based on a similar provision contained in article 5 of the Model Treaty on Mutual Assistance in Criminal Matters. 322/

Article 62

Provisional measures

In cases of urgency, the Court may request of the State concerned any or all of the following:

(a) to provisionally arrest the person sought for surrender;

(b) to seize evidence needed in connection with any proceedings which shall be the object of a formal request under the provisions of this Statute; or

(c) to take as a matter of urgency all necessary measures to prevent the escape of a suspect, injury to or the intimidation of a witness, or the destruction of evidence.

Commentary

When circumstances so require, the Court may also request the State concerned to take provisional measures, including measures to prevent the accused from leaving its territory or the destruction of evidence located in its territory. In connection with this article, the Working Group considered article 9 of the Model Treaty on Extradition adopted by the General Assembly in resolution 45/116 on 14 December 1990 as well as article 55 of the Proposal for an International War Crimes Tribunal for the Former Yugoslavia prepared under the auspices of the Conference on Security and Cooperation in Europe. 323/

Article 63

Surrender of an accused person to the Tribunal

1. As soon as practicable after affirming the indictment under article 32, the Prosecutor shall seek from the Bureau or, if a Chamber has been constituted, from the Chamber, an order for the arrest and surrender of the accused.

2. The Registrar shall transmit the order to any State on whose territory the accused person may be found, and shall request the cooperation of that State in the arrest and surrender of the accused.

322/ Adopted by General Assembly resolution 45/117 on 14 December 1990.

323/ Document S/25307.

3. On receipt of a notice under paragraph (2):

(a) a State party which has accepted the jurisdiction of the Court with respect to the crime in question shall take immediate steps to arrest and surrender the accused person to the Court;

(b) a State party which is also a party to the treaty establishing the crime in question but which has not accepted the Court's jurisdiction over that crime shall arrest and, if it decides not to surrender the accused to the Tribunal, forthwith refer the matter to its competent authorities for the purpose of prosecution;

(c) in any other case, a State party shall consider whether it can, in accordance with its constitutional processes, take steps to arrest and surrender the accused person to the Tribunal.

4. The surrender of an accused person to the Tribunal constitutes, as between the States parties to this Statute, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case submitted to its competent authorities for the purpose of prosecution.

5. A State party should, as far as possible, give priority to a request under paragraph 2 over requests for extradition from other States.

6. A State party may delay complying with paragraph 3 if the accused is in its custody and is being prosecuted for a serious crime or is serving a sentence imposed by a court for a crime.

7. A State party may, within 45 days of receiving an order under paragraph 2, file a written application with the Registrar requesting the Court to set aside the order or quash the indictment on specified grounds. Pending a decision of the Chamber on the application, the State concerned shall take all necessary provisional measures under article 62.

Commentary

(1) The Bureau or a Chamber, acting on behalf of the Court, would issue an order at the request of the Prosecutor for the arrest and surrender of the accused once the indictment has been affirmed. The order would be transmitted by the Registrar to any State on whose territory the accused may be found.

(2) The term "surrender" was considered to be broad enough to cover situations in which the accused is to be arrested and delivered to the Tribunal for trial, as well as situations in which the person is already in custody and is to be transferred to the Tribunal for trial. With respect to the latter situation, the person may have already been arrested and be awaiting trial for criminal charges under national law or may have already been convicted for such a crime and be serving a term of imprisonment. The

trial of such a person by the Tribunal would be subject to the principle non bis in idem which may apply in accordance with article 45.

(3) Paragraph 3 of this article provides for the surrender of an accused person by a State in three different situations, as follows: (a) a State party which has accepted the jurisdiction of the Court with respect to the crime in question must take immediate steps to arrest and surrender the accused person to the Court; (b) a State party which is also a party to the relevant treaty defining the crime in question but has not accepted the Court's jurisdiction must arrest and either surrender or prosecute the accused; and (c) a State party which is not a party to the relevant treaty must consider whether its internal law permits the arrest and surrender of the accused.

(4) A State party should, to the extent possible, give priority to requests from the Tribunal for the surrender of an accused over extradition requests from other States, according to paragraph 5 of this article. However, only a State party which has accepted the jurisdiction of the Court with respect to the particular crime would be obliged to do so under paragraph 3 (a). Other States parties would be required to prosecute the accused if they decided not to surrender the person for trial by the Tribunal. The Working Group decided to return to the question of whether such a State should also be allowed to extradite the accused to another State for prosecution rather than surrendering the person to the Tribunal.

(5) The surrender of a person to the Tribunal would constitute sufficient compliance with any treaty obligation to prosecute or extradite a person suspected of committing a crime referred to in the treaty, as between the States parties to the Statute. One member queried whether the phrase "as far as possible" in paragraph 5 of this article would adequately cover situations in which a State party requested and obliged to surrender the accused to the Tribunal under paragraph 3 (a) was subject to a preexisting treaty obligation to extradite to a State which was not a party to the Statute. In this connection, attention may be drawn to the Vienna Convention on the Law of Treaties. [324]

(6) This article, as presently drafted, did not envisage the suspension of criminal proceedings in a national court to allow a person to be transferred to the Tribunal for trial or the transfer of any such proceedings to the

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[324] United Nations, Treaty Series, vol. 1155, No. 18232, p. 331.

Tribunal, although the proceedings may relate to acts constituting crimes referred to in this statute. Paragraph 6 provides that a State party may delay complying with a request for a person who is being prosecuted for a serious crime or is serving a sentence imposed by a court for a crime, in contrast with a person who is arbitrarily detained or whose presence is not required in connection with the administration of criminal justice in that State. As regards the former situation, the present statute differed from the Statute of the International Tribunal for the former Yugoslavia which established the primacy of the International Tribunal over the national courts and provided that a State may be requested to defer to the competence of the International Tribunal with respect to a particular individual.

(7) A State party which receives an order pursuant to this article may request that it be set aside and challenge the indictment on specified grounds, possibly relating to the jurisdiction of the Court or the factual basis for the indictment. As discussed in connection with article 38, the Working Group will consider at a later stage the appropriate judicial organ for deciding such matters.

Article 64

Rule of speciality

1. A person delivered to the Tribunal shall not be subject to prosecution or punishment for any crime other than that for which the person was surrendered.

2. Evidence tendered shall not be used as evidence for any purpose other than that for which it was tendered.

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes specified in the request.

Commentary

(1) This provision sets forth the rule of speciality under which a person delivered to another jurisdiction can only be prosecuted or punished for the crime indicated in the initial request, according to paragraph 1.

(2) Similarly, evidence tendered to another jurisdiction can only be used as evidence for the purpose stated in the original request, according to paragraph 2. The Working Group felt that a distinction should be drawn between the use of evidence as a source of information which may lead to the investigation of the same person for other crimes or the investigation of

other persons who may have been involved in related criminal activity. Thus, the limitation on the use of evidence provided by States applies to its specific use as evidence in a criminal proceeding rather than for other purposes, such as information leading to other investigations or possibly the impeachment of a witness. In this connection, attention may be drawn to the Model Treaty on Mutual Assistance in Criminal Matters 325/ which recognizes that States may not wish to limit the use of information received with respect to all crimes, but rather to restrict this limitation to fiscal crimes.

(3) The Court may request the State concerned to waive such limitations with respect to either persons or evidence, as provided in paragraph 3.

(4) The Working Group considered article 14 of the Model Treaty on Extradition concerning the rule of speciality in connection with paragraph 1 and it took into account article 8 of the Model Treaty on Mutual Assistance in Criminal Matters 326/ concerning limitations on the use of evidence.

PART 7. ENFORCEMENT OF SENTENCES

Article 65

Recognition of judgements

> States parties undertake to recognize and give effect to the judgements of the Court. Where necessary or appropriate, States parties shall enact specific legislative and administrative measures necessary to comply with the obligation to recognize the judgements of the Court.

Commentary

States parties to the Statute must recognize and give effect to judgements of the Court and, where necessary, enact the national legislative and administrative measures required to do so, in accordance with article 65. This article recognizes that, as a general rule, States will not enforce the criminal or penal judgements of other States in the absence of a treaty. In this regard, attention may be drawn to paragraph 3 (b) of article 1 of the Model Treaty on Mutual Assistance in Criminal Matters and the Optional

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325/ General Assembly resolution 45/117 adopted on 14 December 1990.

326/ Ibid.

Protocol thereto concerning the proceeds of crime, as well as the European Convention on the International Validity of Criminal Judgements. [327]

Article 66

Enforcement of sentences

> 1. States parties are requested to offer facilities for imprisonment in accordance with this Statute.
>
> 2. Imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Tribunal their willingness to accept convicted persons.
>
> 3. If no State is designated under paragraph 2, the imprisonment shall be served in a prison facility made available by the State referred to in article 3.
>
> 4. Imprisonment under paragraphs 2 or 3 shall be subject to the supervision of the Court.

Commentary

(1) The prison sentences imposed by the Court are to be served in the prison facilities of a State designated by the Court or, in the absence of such a designation, in the State where the Tribunal has its seat as provided for in article 3. Since the limited institutional structure of the Tribunal, as presently envisaged, would not include a prison facility, States parties would be requested to offer the use of such facilities to the Tribunal.

(2) There may be situations in which States parties are unwilling to make their prison facilities available to the Tribunal or the Court decides not to designate any of the States which are willing to do so. Thus, the Working Group felt that it was necessary to provide a residual rule to cover such situations, namely sentences are to be served in the prisons of the host country in the absence of the designation of another State. This is consistent with the special responsibilities incumbent on the State selected to serve as the seat of the Tribunal under article 3. The Working Group agreed to return to the factors to be considered by the Court in deciding whether to designate a State under paragraph 2, while recognizing that this matter may be more appropriately dealt with in the rules of the Court.

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[327] 1970 Eur.T.S. No. 70.

(3) While the prison facilities would continue to be administered by the national authorities, the terms and conditions of imprisonment should be in accordance with international standards, notably the Standard Minimum Rules for the Treatment of Prisoners adopted under the auspices of the United Nations. 328/ The imprisonment of the convicted person would be subject to the supervision of the Court, the details of which may be elaborated in its rules. For example, the rules could establish the procedures under which a convicted person could seek redress for mistreatment or provide for periodic reports by the national authorities, taking into consideration the limited institutional structure of the Tribunal.

(4) In recognition of the substantial costs which may be involved in the incarceration of convicted persons for prolonged periods of time, as may be expected for the serious crimes referred to in this Statute which allows maximum terms of life imprisonment, it was suggested that all States parties should share the burden of such costs as expenses of the Tribunal. The Working Group decided to return to the financial aspects of the Tribunal.

Article 67

Pardon, parole and commutation of sentences

1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Court.

2. If a notification has been given under paragraph 1, the prisoner may, subject to and in accordance with the rules, apply to the Court seeking an order for pardon, parole or commutation of the sentence.

3. If the Bureau decides that an application under paragraph 2 is apparently well-founded, it shall convene a Chamber to consider and decide whether in the interest of justice the person convicted should be released and on what basis.

4. When imposing sentence, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to pardon, parole or commutation of the State which, under article 66, is responsible for implementing the sentence. In such a case the consent of the Court is

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328/ Adopted by the First United Nations Congress on the Prevention of Crimes and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. It is reprinted in Human Rights, Compilation of International Instruments (ST/HR/1/Rev.3).

not required for subsequent action of that State in conformity with those laws, but the Court shall be given at least 45 days notice of any decision which might materially affect the terms or extent of the imprisonment.

5. Except as provided in paragraphs 3 and 4, a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

Commentary

(1) The Working Group felt that the Statute should provide for the possibility of pardon, parole and commutation of sentence. Some members felt that such questions should be decided on the basis of a uniform standard, while other members felt that consideration must be given to the efficient administration of justice by the national authorities.

(2) This article provides that the State where the person is imprisoned must notify the Court if the person would be eligible for pardon, parole or commutation of sentence under the law of that State, in accordance with paragraph 1. Following a notification received under paragraph 1, the prisoner would apply to the Court for an order granting pardon, parole or commutation of the sentence. The Bureau would convene a Chamber to consider the matter if the application appeared to be well-founded.

(3) In imposing a sentence, the Court may also provide that the sentence is to be governed by specified laws as to these matters. In such cases, the Court must be notified prior to any decision that would materially affect the terms or extent of imprisonment, but the consent of the Court would not be required.

(4) Except as provided in this article, a person should not be released before the sentence imposed by the Court has been served.

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